UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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|---|---|---|
| NEXSTAR BROADCASTING, INC. d/b/a KOIN-TV, | ) | |
| Respondent, | ) | |
| | ) | Case Nos. 19-CA-248735 |
| And | ) | 19-CA-255180 |
| | ) | 19-CA-259398 |
| NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO, | ) | 19-CA-262203 |
| Charging Party | ) | |

**RESPONDENT'S POST-HEARING BRIEF**

NOW COMES NEXTSAR BROADCASTING, INC. d/b/a KOIN-TV, ("KOIN", "Nexstar" or "Respondent"), and files its post-hearing brief as follows:

**INTRODUCTION**

This case arises out of extended negotiations between KOIN and National Association of Broadcast Employees & Technicians, Local 51 ("NABET" or "Union"). These negotiations began in mid-2017 and continued through December 2019. Respondent withdrew recognition from the Union on January 8, 2020. During the negotiations, each party filed multiple unfair labor practice charges against the other, resulting in multiple complaints, a series of decisions by the Board, some settlements with the Union, and ultimately a Second Consolidated Complaint, as amended, against Respondent, which was heard by the Honorable Amita B. Tracy, Administrative Law Judge on

November 12, 13, 16, 17, and 18, 2020, in a ZOOM proceeding. Respondent now files its post-hearing brief.

## STATEMENT OF FACTS

A. The Two Bargaining Units

NABET historically has represented two units of employees at KOIN:

> The first, as certified by the National Labor Relations Board, consists of all regular full-time and regular part-time engineers and production employees, but excluding chief engineer, office clericals, professionals, guards and supervisors as defined in the Act, and all other employees of KOIN-TV.
>
> The second, as voluntarily recognized by the parties, consists of all regular full-time and regular part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (aka "performer"), office clericals, professionals, guards and supervisors as defined in the Act and all other employees of KOIN-TV.

(Second Consolidated Complaint, ¶¶ 5(a), 5(b); Answer, ¶¶ 5(a), 5(b))

B. The Parties

Nexstar is an owner and operator of local television stations affiliated with the major broadcast networks. Based in Irving, Texas, it operates stations in cities as large as Los Angeles (DMA 2) to as small as Brownsville, Texas. (DMA 177).[1] At the time of the hearing, Nexstar operated 197 stations. This number had grown substantially as a result of two large acquisitions: Media General in 2016 and Tribune Broadcasting in 2019. The Media General deal resulted in the acquisition of KOIN. (Tr. 570-571). At the time of this acquisition, KOIN was party to a collective

[1] Stations are rated on market size by Nielsen with 1 being the largest market. "DMA" apparently stands for "Dominant Market Area." (Tr. 66).

bargaining agreement with NABET, Local 51, which was effective from July 29, 2015, to July 28, 2017 (the "Expired CBA"). (Jt. Exh. 1, ¶ 1; Jt. Exh. 2).[2]

C. General Overview Of Negotiations

As noted, the most recent collective bargaining agreement between KOIN and NABET was effective from July 29, 2015, to July 28, 2017 (the "Expired CBA"). (Jt. Exh. 1, ¶ 1; Jt. Exh. 2). [3] Negotiations for a successor agreement began on June 21, 2017. Thereafter, the parties would meet on 42 dates, typically 2 days at a time. Meetings occurred on the following dates: June 21 and 22, 2017; August 17 and 18, 2017; September 7 and 8, 2017; October 12 and 13, 2017; November 30 and December 1, 2017; January 9 and 10, 2018; February 15 and 16, 2018; March 22 and 23, 2018; May 3 and 4, 2018; June 21 and 22, 2018; August 8 and 9, 2018; September 11 and 12, 2018; October 15 and 16, 2018; November 26 and 27, 2018; December 13 and 14, 2018; January 24 and 25, 2019; April 23 and 24, 2019; June 26 and 27, 2019; August 15 and 16, 2019; October 8 and 10, 2019; and December 9 and 10, 2019. (JX-1, ¶ 3).

Respondent's bargaining team was comprised of: Vice President of Labor and Employment Relations Chuck Pautsch (Pautsch"); Nexstar Broadcasting President Tim Busch ("Busch") (who participated only through January 1, 2019); KOIN Broadcasting, Inc. Vice President and General Manager Patrick Nevin ("Nevin"); Business Administrator/Human Resources Representative Casey Wenger ("Wenger"); Director of Technical Operations Rick Brown ("Brown"); and KOIN

[2] This was but one of roughly 42 collective bargaining agreements (21 with IBEW, 10 with NABET, 2 with IATSE, and 9 with SAG-AFTRA) to which Nexstar was a party. Most of these agreements had originally been inherited through acquisitions, and many had either been renegotiated, or were in the process of being renegotiated, by Nexstar while negotiations with Local 51 were ongoing. (Tr. 572-573).

[3] The CBA was extended by mutual agreement on two occasions, but was allowed to expire in September 2017. (JX-1, ¶ 2).

News Director Rich Kurz ("Kurz"). Pautsch has served as Respondent's lead negotiator since early in the bargaining process. (JX-1, ¶ 4).

The Union's bargaining team was comprised of: NABET Local 51 President Carrie Biggs-Adams ("Biggs-Adams") and an employee representative. Ellen Hansen ("Hansen") served as the employee representative on the Union's bargaining team from about October 12, 2017, through the end of bargaining in December 2019. The Union's attorney, Anne Yen ("Yen"), was also present for the August 15 and 16, 2019 bargaining sessions. Biggs-Adams served as the Union's lead negotiator throughout the bargaining process. (JX-1, ¶ 5).

An FMCS Mediator first joined the parties for bargaining starting at the March 22, 2018 session and participated in every session thereafter, through the conclusion of bargaining in December 2019. (JX-1, ¶ 6). It was Respondent who "felt strongly" that a mediator should be brought in to assist. (Tr. 109).

Negotiations were often tense and chippie at times, particularly in 2017 and early 2018 prior to the arrival of the federal mediator. (Tr. 315). The record reflects that there were major personality differences between the parties' negotiators, and each party came to the table with polar opposite bargaining styles. Each party accused the other of unprofessional and disrespectful behavior. Nexstar President Busch preferred what he referred to as "progressive bargaining," in which proposals on any given subject would be met with successive proposals until an agreement was reached. From the perspective of Busch and his team, Union President Biggs-Adams was unstructured, frequently volatile, prone to profane outbursts, and ill prepared, seldom coming to the table with specific written proposals. Biggs-Adams, on the other hand, testified that she felt disrespected by KOIN's team, complaining when she was addressed without reference to her Union title or otherwise "disrespected." (Tr. 165-168, 173, 483, 578-583). Biggs-Adams, by her

own admission, could "dish it out just as much as it may be dished towards me, and I certainly don't shy away from swearing." (Tr. 165). Thus, the negotiations proceeded with some degree of rancor.

The record contains all of the written proposals and exchanges between the parties, as well as each party's bargaining notes for 2019. Despite their difficulties, the parties eventually were able to come to tentative agreements on a large number of subjects. On June 21, 2017, tentative agreements were reached on Agreement (C-2), Automobile Travel (C-21), and Creative Services Producers, editors and Videographers Job Description (C-33). On June 22, 2017, the parties reached a tentative agreement on News Videographer Job Description (C-34). On August 17, 2017, the parties reached a tentative agreement on Editors Job Description (C-35). On September 8, 2017, a tentative agreement was reached on Recognition and Warranty (C-3). On October 13, 2017, the parties reached a tentative agreement on Assignment Editor Job Description (C-31). On November 30, 2017, the parties reached a tentative agreement on News Media Producer – Digital Content Job Description (C-32). On January 9, 2018, a tentative agreement was reached on Bulletin Boards (C-5). On January 10, 2018, the parties reached a tentative agreement on Jury Duty (C-40). On February 16, 2018, the parties reached a tentative agreement on Directors—Ignite Operators Job Description (C-29). On March 23, 2018, tentative agreements were reached on Release Time for Negotiations (C-6), Leave of Absence for Union Business (C-9); Job Descriptions Engineering (C-27) , Graphic Artist Job Description (C-36), and Funeral Leave (C-41). On June 21, 2018, tentative agreements were reached on Picket Lines (C-10), Strikes and Lockouts (C-14), and Hours of Work (C-16). On June 22, 2018, a tentative agreement was reached on Grievance and Arbitration Procedure (C-13). On August 8, 2018, a tentative agreement was reached on Management Rights (C-4). On August 9, 2018, tentative agreements were reached on

Discipline and Discharge (C-15), Duties and Jurisdiction (C-26), Master Control Job Description (C-28), Associate Producers – Writers Job Description (C-30), Seniority and Layoffs (C-38), and Military Service (C-42). On September 12, 2018, the parties reached tentative agreements on the Cover Page (C-1), and 7 Days Notice of Job Openings (C-11). On October 15, 2018, tentative agreements were reached on Notification of New Hire (C-12), Paid Travel Time (C-22), and Other Expense Reimbursement (C-23). On November 27, 2018, the parties reached tentative agreements on Rest Period (C-19), Days Off (C-20), Freelance Employees (C-25), and Miscellaneous (C-44). On December 13, 2018, the parties reached tentative agreements on Part Time Employees and Daily Hires (C-24), Flexible Work Assignments (C-37), and No Discrimination (C-45), On December 14, 2018, the parties reached a tentative agreement on Vacation Postings and Selection (C-39). (RX-2).

As the parties entered into calendar year 2019, the only issues that remained unresolved were Paid Leave (CE-1), Insurance/Benefits (CE-2), Daily Overtime (CE-17), 6th & 7th Day Pay (CE-18), Union Security (C-5), Union Business (C-6), Indemnification Letter (C-47), and Wages. (JX- 9, 11).

D. Scheduling Of Meetings

The bargaining sessions were generally scheduled by mutual agreement. The parties would get out their calendars and attempt to come up with two consecutive days that everyone was available. This became more difficult once the mediator joined the negotiations. As described by Biggs-Adams:

> Well, over time, I have learned that meeting rooms in Portland can be almost as hard as syncing the calendars of the people who are going to be participating.
>
> So from the time we added the federal mediator in 2018, that she came into the process, we had her scheduled, the company schedules, my

> schedule, and then we had finding a place to meet. And at certain times of the year, it's almost impossible to get conference rooms in Portland.

(Tr. 51).

The record reflects that each party diligently sought to find acceptable dates and no complaints were raised by the Union regarding the frequency of the meetings. (Tr. 319-326, 584-585). While there were fewer meetings in 2019 than in 2018, this was more a reflection of the fact that little was being accomplished, and even the mediator began to question the purpose of the ongoing meetings. (JX 15, p, 19).

The Second Consolidated Complaint places in issue the failure to meet in May and July 2019 and the cancellation of meetings in January 2020. Regarding the month of May, Biggs-Adams' own bargaining notes reflect that at the end of the April 24, 2019 meeting, the parties "[a]greed via the mediator to bargaining June 25 and 26." (JX 13, p. 6). [4] Her notes shed no light on how these dates were arrived at or why no meetings were held in May. Similarly, Biggs-Adams' notes for June 27, 2019 merely state "Dates in July is booked." (JX 13, p. 13). Respondent's notes simply state "Date for July: No date available." (JX 15, p. 10). Both parties' notes reflect that the parties would meet on August 15 and 16, after a hearing that was scheduled for August 13 and 14.

Regarding the January 2020 meetings, Biggs-Adams' notes for October 9, 2020 merely state "14 + 15 January." (JX 13, p. 27). However, Respondent's notes, as well as those of Ellen Hanson, reflect that the mediator called a caucus at 10:33 a.m. and that the meeting thereafter ended. There is no indication that January dates were agreed to. (JX 14, p. 18; JX 15, p. 19). Biggs-Adams' October 10, 2019 Bulletin to employees states:

> Our next bargaining dates will be December 9th and 10th and January 14th and 15th. We had sought November dates, but the Company and the

[4] For reasons that the record does not reflect, these meetings actually occurred on June 26 and 27.

> Federal Mediator were not available during the 2 weeks we offered. We will set a location and let you know where it will be so hopefully you can drop by and participate.

(JX 17, p. 44).

Biggs-Adams' notes for December 10, 2019, indicate that she requested a caucus at 10:22 a.m. Her notes then reflect:

> Dates: 23/25 January
> 11+12 February
>
> Company had left by 12 noon and we were unable to get February dates.
>
> First Mediator objected to January 13 + 14 dates – and wanted to move to January 23 + 24. Carrie said we already signed contract with the Marriott.
>
> Later offered January 13 + 14 with February 11 + 12

(JX 13, p. 34).

The record reflects that at 4:26 p.m. on December 10, the mediator sent an email to the parties apologizing "for the somewhat disjointed wrap up of mediation this afternoon." She sought to "confirm the parties request to hold January 14 & 15 at the Marriott for the next mediation session. If those dates are not workable I am available January 23 and 24." (JX 51, p. 2). Biggs-Adams replied, stating that rooms had already been booked at the Marriott for January 14 and 15 and "For now we will hold the Marriott reservation." (JX 51, p. 2). Shortly thereafter, Pautsch responded as follows:

> There has been a misunderstanding. I am not available on January 14 and 15 as I need to be in NY that week. We are available on January 23 and 24 in lieu of these dates. That is what I thought we had conveyed and thought you would check on with Marriott. We can check on those dates if you like.

Biggs-Adams then replied:

> Chuck we had agreed to the January dates back in November, which is why we had tried to book both sets of dates at The Porter and when that didn't work we booked the Marriott.

Here is what we propose –

1. Deedee will try to move the January 14 and 15 dates to the January 23rd and 24th dates.
2. Please confirm the February dates of February 11 & 12 (Tuesday and Wednesday) which we had told the Mediator earlier this morning were possible for us.
3. Once I hear those are confirmed, we will try the Porter followed by the Marriott for meeting rooms.

(JX 51, p. 1).

As discussed later, Respondent withdrew recognition from the Union on January 8, 2020, and the January 23 and 24 meetings never occurred.

E. 2019 – Parties Exert Pressure Away From The Bargaining Table.

2019 was a tumultuous year in which little positive was accomplished at the bargaining table. Rather, both parties engaged in "campaigns" to increase economic pressure on the other party. These campaigns were varied, but they included multiple communications with employees and dueling unfair labor practice charges. The Union also engaged in economic activity aimed at convincing Respondent's advertisers to cease advertising with KOIN. Respondent subsequently ceased collecting Union dues, thereby placing economic pressure on the Union.

1. Competing Communication Campaigns

Throughout 2019, both parties communicated with employees through bulletins, updates, and memos. The Union's communications were issued by Biggs-Adams. Although Respondent's communications were issued over the signature of Nevin, they were largely penned by its inside labor counsel, Pautsch. (Tr. 636). No purpose would be served at this juncture in describing these communications in detail. However, they are discussed more specifically where appropriate in the Argument section of this brief. It is sufficient now to say that each party sought to lay all fault for bargaining difficulties at the feet of the other party. As the negotiations continued without success,

the tone in each party's communications became more and more personal, particularly as the Union began its mobilization efforts.

2. Economic Pressure/Mobilization

In an effort to exert economic pressure on Respondent, Biggs-Adams initiated a "mobilization" campaign that she had used in the past with some success. (Tr. 111-112). She described mobilization as follows:

> Well, mobilization comes in a pretty wide range of actions. But the purpose is to get us to a contract. So if talking at the bargaining table isn't getting us there, then external pressure put on by members and members of the community to urge the Employer to bargain with us . . . .

(Tr. 351).

Biggs-Adam elaborated:

> We sometimes have letter writing campaigns, where members of the community write to the leadership at the station, usually a general manager or vice president. We sometimes take economic action, asking advertisers to withdraw their advertising until we reach a contract. . . . I've been known to dress up in costumes and dance through the streets of Washington, D.C.

(Tr. 352).

The record reflects that Biggs-Adams engaged in most, if not all, of these tactics with Nexstar. In her September 12, 2018 Bulletin, Biggs-Adams noted that "Mobilization is the key – and we are planning increased activity to get us to the Contract we deserve." Biggs-Adams suggested that KOIN employees follow the lead of teachers in Washington State, who had "mobilized and educated the community for months before they went on strike." (JX 17, p. 27).

On November 20, 2018, an article appeared on the website "peoplesworld.org," which was entitled "TV chain Nexstar splits workers with different raise offers, shifts cash to shareholders." Biggs-Adams was prominently quoted in the article. According to the article, Respondent had offered employees a 0.1% wage increase in Portland, and made other take-away proposals while

raking in millions of dollars in revenues. (JX 63, pp. 78-80). Three weeks later, Respondent made a written request for documents and correspondence reflecting such alleged proposals, as well as communications between Biggs-Adams and peoplesworld.org. The Union declined to furnish this information. (JX 63, pp. 80-81). As discussed below, the Board subsequently found that the Union unlawfully refused to furnish relevant information. (JX 63, pp. 76-93; JX 66).

On December 15, 2018, the Union conducted "training for activists interested in being stewards or mobilizers for the Local." (JX 17, p. 29). On January 25, 2019, Biggs-Adams advised employees: "We are getting ready to take our mobilization public (many of you have been contacted about the plans)." (JX 17, p. 34). In early June 2019, the Union engaged in bannering in front of one of Respondent's advertisers, Standard TV and Appliance. The banner stated: "Support KOIN-TV Workers Please Don't Shop Here." (JX 25). In her June 26, 2019 Bulletin to employees, Biggs-Adams defended the Union's activities:

> Why Did We Start Going to Advertisers? - NABET has a tradition of putting on economic pressure when bargaining just won't move. We mobilized here in Portland during the last negotiations with KOIN, and had many advertisers pull their ads (back when Media General owned KOIN). That helped lead to the contract getting settled in the summer of 2015.
> Aren't we biting the hand that feeds us? We are asking the public not to shop at the advertisers who won't pull their ads, and this is perfectly legal. KOIN tried to intimidation with another ULP against us - but we know we are legal, using our free speech rights to inform the public, and following the rules. Showing up to take our pictures (companies cannot intimidate you for using your right to free speech) is not allowed, but Pat Nevin is coming out on the weekends to scare you. We will have the NLRB resolve that one as well. Their ULP has been sent to Washington for Advice, we will let you know if and when it returns to Portland.

(JX 17, p. 38).

In her July 5 Bulletin, Biggs-Adams advised employees:

> Now members at KOIN6-TV had started asking advertisers to stop advertising with KOIN6-TV until there is a contract. If you have seen other NABET-CWA campaigns over the years, you know that this has been a

> very successful mobilization technique (in fact the KOIN folks did this in 2013-15 during their last bargaining when they were owned by LIN Media and Media General - yes they get sold a lot). Additionally, they have taken to social media, and that is where you come in - please take action to sign their petition to General Manager Pat Nevin telling him to bargain with the Union and stop Union Busting.
>
> This weekend is Portland's Waterfront Blues Fest http://www.waterfrontbluesfest.com/ and KOIN6 is a major sponsor. Please add your voice to those of the music fans, and union represented workers in Portland by taking Action!
>
> You can like them on Facebook at:
>
> https://www.facebook.com/KOIN6Bosses/
>
> Tweet them at: https://twitter.com/KOIN6Bosses
>
> And sign their Petition to the General Manager at: https://koin6bossesexposed.tv/

(JX 17, p. 41).

Initially, the Company responded to the Union's mobilization efforts through Nevin's bargaining updates to employees. In these updates, Nevin described and criticized the Union's tactics, Biggs-Adams style of negotiating, and the exorbitant amount of the Union's initiation fees. (JX 25, 26, 30). As discussed below, Respondent also filed an unfair labor practice charge over the secondary bannering of Standard TV. On August 2, 2019, Respondent advised employees and the Union that it would no longer deduct Union dues while there was no contract in place. (JX 31, 32).

On September 27, 2019, Biggs-Adams sent a letter to KOIN employees who had not become Union members. In this letter, Biggs-Adams advised employees that the Union Executive Board had voted to waive initiation fees for any employee who joined the Union in the month of October:

> The Executive Board of Local 51 votes to waive the initiation fee for members of the bargaining unit of KOIN-TV for applications submitted during the month of October 2019. New members shall immediately begin

> paying dues on their earnings for the month of October 2019, shall continue to pay their dues in a timely manner, shall sign a dues checkoff form that will be effective when a new contract is in place, and shall remain members in good standing of NABET during their employment at KOIN-TV or any other NABET represented workplace.

(JX 40).

Each party also sought to exert pressure on the other through the filing of unfair labor practice charges.

3. NABET'S Charges Against KOIN

Prior to filing the charges that are the subject of this proceeding, NABET filed a series of charges that eventually resulted in Board orders. In case number 19-CA-211026, the Board issued an order on April 24, 2019, finding that Respondent had unlawfully refused to furnish certain information requested by the Union on November 30, 2017. This information concerned the performance of on-air graphics work. 367 NLRB No. 117 (2019). (JX 63, pp. 1-8). The case was closed on compliance on November 7, 2019. (JX 66).

In case numbers 19-CA-219985 and 19-CA-219987, the Board issued an order on April 21, 2020, finding that Respondent made certain unlawful unilateral changes following the termination of the CBA. Specifically, the Board found that Respondent unlawfully unilaterally changed schedule-posting requirements and implemented a new requirement that employees complete a motor vehicle/driving history background check on their anniversary dates. 369 NLRB No. 21 (2020). (JX 63, pp. 101-110). These cases are pending before the United States Court of Appeals for the Ninth Circuit. (JX 63, p. 9; JX 66).

In case number 19-CA-240187, the Board issued a decision on January 7, 2021, finding that Respondent unlawfully issued a written warning (in July 2018) to employee Ellen Hanson and refused to provide the name of a witness to the alleged misconduct. 370 NLRB No. 68. Given the

recentness of this decision, Respondent is still evaluating whether to comply or instead to seek review in the court of appeals.

In case number 19-CA-240187, the Board recently found that Respondent, in December 2018, unlawfully failed to furnish information regarding other union contracts in which the union reimbursed Respondent for the cost of dues checkoff and the actual costs of dues checkoff at those facilities and at the KOIN facility. 370 NLRB No. 72. KOIN is still evaluating its appeal options.

4. KOIN'S Charges Against NABET

On July 2, 2018, KOIN filed charge number 19-CB-223109 against NABET alleging an unlawful refusal to furnish relevant information. The Regional Director issued a merit dismissal on the refusal to furnish information. KOIN's appeal was denied by the General Counsel on April 26, 2019. (JX 66; Tr. 367-368).

On January 29, 2019, KOIN filed charge no. 19-CB-234944 against NABET alleging an unlawful refusal to furnish relevant information. This charge was the subject of a hearing before an ALJ, who issued a decision on March 10, 2020, finding that the Union had violated § 8(a)(5). No exceptions were filed, and the Board (in an unpublished opinion) adopted the ALJ's Decision as its own on April 22, 2020. (JX 63, pp. 76-93; JX 66). The information was never furnished to Respondent.

On June 4, 2019, KOIN filed charge number 19-CC-242731, alleging that NABET engaged in unlawful secondary activity by bannering in front of Standard TV. This charge was placed in abeyance on July 12, 2019, and remains in that status. (JX 66). On October 27, 2020, the Board invited briefs on the lawfulness of bannering. That issue remains under consideration by the Board.

On July 1, 2019, KOIN filed charge number 19-CB-244300 against NABET, alleging an unlawful refusal to furnish information. A Complaint issued on June 5, 2020. This Complaint

alleged that NABET unlawfully refused to furnish the following relevant information requested by Respondent on June 26, 2019:

i. All dues and initiation fees authorization forms signed at any time by individuals employed at KOIN-TV from January 1, 2017 to present.

ii. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present outlining or describing their rights under the Beck decision to not pay for the union's political lobbying efforts.

iii. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present outlining or describing their rights to revoke their dues and initiation fees authorization forms.

iv. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present notifying said individuals that the collective bargaining agreement between KOIN-TV and NABET-CWA has expired.

v. All documents establishing the amount of monthly dues charged to employees at KOIN-TV in the collective bargaining unit represented by NABET-CWA, including but not limited to the By-Laws provision establishing same and referendum establishing same.

(JX 63, p. 14).

On October 28, 2020, the Regional Director entered into a unilateral settlement agreement with NABET. KOIN's appeal of the unilateral settlement agreement to the General Counsel was subsequently denied. The information was never furnished to Respondent. (JX 66).

On September 27, 2019, KOIN filed charge number 19-CB-248966 against NABET, alleging an unlawful refusal to furnish information related to health and welfare benefits. The Regional Director dismissed the charge, but KOIN's appeal was sustained. On October 28, 2020, the Regional Director entered into a unilateral settlement agreement with NABET. KOIN's appeal

to the General Counsel was subsequently denied. The information was never furnished to Respondent. (JX 66).

Also on September 27, 2019, KOIN filed charge number 19-CB-248967 against NABET, alleging that the Union violated § 8(b)(3) by refusing to bargain over the mandatory subject of the terms under which dues would be checked off and collected by the Company. This charge was dismissed by the Regional Director on September 25, 2020. Respondent's appeal was subsequently denied by the General Counsel. (JX 66).

On February 26, 2020, KOIN filed charge number 19-CB-257037 against NABET, alleging that the Union violated § 8(b)(1)(A) by offering to waive its initiation fees for the month of October 2019 and by issuing a Welcome Letter (at a time when no contract was in place) informing employees that they were required to join the Union and pay dues and initiation fees. The Regional Director dismissed the charge, but KOIN's appeal was sustained in part. Specifically, the General Counsel concluded that the Welcome Letter was coercive. On October 28, 2020, the Regional Director entered into a unilateral settlement agreement with NABET. KOIN's appeal to the General Counsel was subsequently denied. (JX 63, p. 38; JX 66).

On March 9, 2020, KOIN filed charge number 19-CB-257732 against NABET, alleging that the Union violated §§ 8(b)(3) and (5) by insisting upon an initiation fee that was excessive and/or discriminatory and by coupling it with a union security clause. The Regional Director dismissed the charge on September 25, 2020, and KOIN's appeal was subsequently denied. (JX 66).

On May 11, 2020, KOIN filed charge number 19-CB-260215 against NABET, alleging that the Union violated § 8(b)(3) by engaging in overall bad faith surface bargaining. The Regional

Director dismissed the charge on August 31, 2020, and KOIN's appeal was subsequently denied. (JX 66).

F. The Critical Unresolved Bargaining Issues

The primary issues that the parties could never resolve were Union Security/Union Business, Health Insurance, and Wages. As will be discussed, however, it was the issue of Union Security/Union Business that was the biggest source of conflict and the greatest impediment to the parties reaching a complete agreement.

1. Union Security (C-5)/Union Business (C-6)

The expired CBA contained the following provisions related to Union Security and Union Business (Dues Checkoff):

> ARTICLE 2
> UNION SECURITY
>
> The Company agrees that, *as* a condition of employment, all Employees covered by this Agreement shall, within thirty (30) clays after execution of this Agreement, or in the case of new Employees, thirty (30) days after commencement of their employment whichever is later, become and remain members of the Union, in good standing, during the term of their employment under this Agreement or any extension thereof except for any reason deemed appropriate under law.
>
> The Company will, within three (3) business days after receipt of notice from the Union, give notice to any Employee who has not fulfilled their financial obligation to the Union that their employment will be terminated within one (1) week if he or she does not comply with this provision. The Union agrees to hold harmless and indemnify the Employer for any errors made upon instructions from the Union.
>
> ARTICLE 3
> UNION BUSINESS
>
> 3.1 Dues Cheek-Off; Upon receipt of a signed authorization of the Employee involved in the form set forth herein, the Company will deduct from the Employee's pay check the dues payable by the Employee to the Union during the period provided for in said authorization. Deductions for Union dues shall be remitted to the Local Union no later than the tenth

(10th) day of the month following the deductions and shall include all deductions made in the previous month. The Company will furnish the Local Union, at that time, with an alphabetical record of those for whom deductions have been made, Social Security number, gross earnings of each Employee for the period and the total amount of each deduction.

The Union agrees to hold harmless and indemnify the Employer for any computational or remission errors made upon instructions from the Union. The Union agrees to notify the Employer in advance of any modifications in dues structures or deductions.

**DUES AND INITIATION FEE CHECK OFF AUTHORIZATION**

*The Company and the Union agree that the Check-Off Authorization shall be in the following form:*

*Name:*
*(Please Print)*

*Position:*

*Social Security Number: _____*

*I hereby authorize KOIN-TV to deduct bi-weekly from my gross earnings a sum equal to__Percent ( ____%) from the previous bi-weekly period including all overtime and penalty payments, on account of membership dues in NABET-CWA. In addition, I further authorize KOIN to deduct from my wages on account of union initiation fees the sum of __dollars, which shall be paid (provide for period and number of payments. The sums thus to be deducted are hereby assigned by me to NABET-CWA, and are to be remitted by the COMPANY to the National Association of Broadcast Employees and Technicians - Communications Workers of America, AFL-CIO, Local 51.*

*I submit this authorization and assignment with the understanding that it will be effective and irrevocable for a period of one (1) year from this date, or up to the* termination *date of the current Collective Bargaining Agreement between KOIN-TV and NABET7CWA, AFL-CIO, whichever occurs sooner.*

*This authorization* and *assignment shall continue in full force and effect for yearly periods beyond the irrevocable period set forth above, and each subsequent yearly period shall be similarly irrevocable unless revoked by me within ten (10) days prior to the expiration of any irrevocable period thereof.*

*Such revocation, shall be affected by written notice by Registered Mail to the Company and the Union within such ten (10) day period.*

*DATE: _____SIGNED:_____*

The Company's initial proposals regarding Union Security and Union Business were to eliminate any union security requirement, as well as any obligation on the part of the Company to collect Union dues or initiation fees. (JX- 5(a), 6(a)). On March 22, 2018, Respondent modified its proposals. It reinstated language obligating employees to become Union members, but struck prior language making Union membership a "condition" of employment or requiring the Company to terminate noncomplying employees. (JX-5(b)). Respondent also reinstated dues checkoff in its proposal, but struck language requiring the Company to provide employee social security numbers, added a requirement that the Union reimburse the Company $10 per employee each month, and revised the authorization form to remove certain restrictions on an employee revoking his/her authorization. (JX-6(b)).

On October 16, 2018, the Union submitted a summary proposal insisting that both articles be fully restored to the contract, with the exception of agreeing to substitute a unique ID number for social security numbers. (JX 5(d)). On December 14, 2018, the Union formally proposed existing contract language, including the requirement that Respondent provide employee social security numbers. (JX 5(e), 6(f)). That same day, Respondent resubmitted its prior proposal regarding Union Security. (JX 5(f)).

On January 24, 2019, Respondent submitted a Package Proposal (#8). On Union Security and Union Business, its proposals remained unchanged from December 14, 2018. (JX 5(g), 6(g)). On April 23, 2019, Respondent modified its Union Security proposal. Specifically, it added language requiring, as a condition of employment, employees to become and remain Union

members in good standing and it included a provision requiring the Company to suspend noncomplying employees until they came into compliance. (JX 5(h)). Later that day (3:30 p.m.) Respondent further modified its Union Security proposal to allow employees to revoke their dues authorization by email to the Union and to include language on the authorization form advising the employee of the option to pay reduced fees (Beck rights). (JX 5(h)). Also on April 23, the Company revised its proposal regarding Union Business. (JX 6(h)). Substantively, it replaced the $10 per employee per month fee with a flat $50 monthly fee. It also added language requiring the Company to notify the Union of new hires (section 3.2) and requiring the Union to indemnify the Company (section 3.3). Respondent's proposal also struck language in the authorization form related to initiation fees, thereby limiting the checkoff authorization to monthly dues. Pautsch testified:

> That's where I came up with what I felt was a work around. You know, trying to figure out a way to let both sides get what they want and I proposed it and stuck with it all the way on this issue.
> . . . .
> Basically, you can charge what you want, but we're not going to collect it. We won't collect the -- the initiation fees. We'll continue to collect dues but we're not going to collect the initiation fees.

(Tr. 626).

During the April 23 session, there was considerable discussion of the Company's proposals.[5] Biggs-Adams asserted that the Company was telling employees that it was negotiating the Union's initiation fees. Pautsch stated that the Company could not collect three weeks in initiation fees and that the Union should collect them. Biggs-Adams stated that initiation fees were up to the members and that the Company's negotiators were union busters. Nevin stated that the Company had a problem with firing employees who were behind on dues. Pautsch disputed the

[5] This summary is based on a composite of the Union's and Company's bargaining notes.

assertion of union busting and added that Nexstar had no other contracts requiring the Company to fire employees. Nevin then addressed the initiation fee, stating that applicants had declined jobs because of the initiation fee. Pautsch asserted that the Company would not be a part of a process that required employees to pay such a high fee, and that the other locals with whom Nexstar dealt all had lower fees. Biggs-Adams responded that all of these stations were smaller than Local 51. Pautsch stated that "it is your business, but when you bring us into it, it becomes our issue." Biggs stated that they would not go without a union shop. (JX 13, pp. 1-2, JX 14, pp. 4-5; JX 15, pp. 4-5).

On June 26, 2019, Respondent submitted a written information request to Biggs-Adams requesting the following information:

1. All dues and initiation fees authorization forms signed at any time by individuals employed at KOIN-TV from January 1, 2017 to present.

2. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present outlining or describing their rights under the Beck decision to not pay for the union's political lobbying efforts.

3. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present outlining or describing their rights to revoke their dues and initiation fees authorization forms.

4. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present notifying said individuals that the collective bargaining agreement between KOIN and NABET-CWA has expired.

5. All documents establishing the amount of monthly dues charged to employees at KOIN-TV in the collective bargaining unit represented by NABET-CWA, including but not limited to the By-Laws provision establishing same and referendum establishing same.

6. All documents calculating the amount the Local has determined to be the portion of its dues collected that are spent on lobbying efforts.

(JX 27).

Biggs-Adams responded later that same day:

In response to your June 26, 2019 memorandum, the Union generally objects that it is not a bona-fide request for information. Instead, it is harassing and delaying to avoid true bargaining. Subject to and without waiving the objection, the Union responds to the so-called "requests" as follows:

1. **(Authorization Forms)** The Employer already has all authorizations pertinent to current dues checkoff for current KOIN-employed members. I am not aware of any reason to believe that any other authorizations requested are relevant to bargaining. If you disagree, please explain why. In addition, any other authorizations are confidential and proprietary between the Union and the affected members, protected by the members' section 7 rights, and protected by the First Amendment.

2. **(Notices - Beck)** I am not aware of any obligation to provide *Beck* notices to an employer, and I am not aware of any reason to believe the requested documents are relevant to any mandatory subject of bargaining. If you disagree, please explain why. In addition, the Union considers such communications proprietary and confidential. As we have discussed before, the Union is not required to bargain about the amount of fees and dues, and the Union declines to do so, because it is not the employer's business. See, e.g.,*Social Services Union, Local 535 (North Bay Center),* 287 NLRB 1223 (1988).

3. **(Notices - Revocations)** I am not aware of any obligation to provide any such communications to an employer, and I am not aware of any reason to believe the requested documents are relevant to bargaining. If you disagree, please explain why. In addition, the Union considers such communications proprietary and confidential, and protected by the Union's First Amendment rights.

4. **(Expiration)** I am not aware of any obligation to provide any such communications to an employer, and I am not aware of any reason to believe the requested documents are relevant to bargaining. If you disagree, please explain why. In addition, the Union considers such communications proprietary and confidential, and protected by the Union's First Amendment rights.

5. **(Dues Referendum)** I am not aware of any obligation to provide any such documents to an employer, and I am not aware of any reason to believe the requested documents are relevant to bargaining. If you disagree, please explain why. The documents requested constitute internal Union documents, which the Union considers proprietary and confidential. See also the NLRB case cited above.

6. **(Lobbying Efforts)** I am not aware of any obligation to provide any such documents to an employer, and I am not aware of any reason to believe the requested documents are relevant to bargaining. If you disagree, please explain why. The documents requested, if any exist, would constitute internal Union documents, which the Union considers proprietary and confidential, and would be protected by the Union's First Amendment rights. See also the NLRB case cited above.

(JX 28).

On June 27, 2019, Respondent wrote back:

> Your objections to our Request for Information of 6/26/19 related to dues checkoff authorization have been reviewed. We believe your objections are submitted in bad faith and in complete disregard of your duty to furnish information when relevant information is requested. The information requested by each of the requests is necessary to our need to negotiate changes to the dues checkoff authorization forms currently in use at the station and appended and expressly made a part of the collective bargaining agreement. (A copy of a revised C#6 is attached).
>
> We believe that the current form, incorporated in the expired agreement, violates elements of General Counsel Memorandum 19-4, as well as the rights of our employees in relation to dues checkoff. You assert, baselessly, that the matter of dues and initiation payment is somehow none of our business, and base your objection to our RFI on this wrongful assertion.
>
> As we have explained a number of times before, while the amount you charge for dues and initiation fees is between you and each member or potential member, it becomes important to our business when you ask us to agree to checkoff dues from each purported member. In performance of this task, we must observe carefully crafted provisions of the Section 302 of LMRDA, the Beck decision, and relevant law as alluded to in GC-19-4.
>
> Please respond by close of business today.

(JX 29).

On June 27, 2019, NABET resubmitted its December proposals (existing contract language) on Union Security. (JX 5 (i)) and Union Business. (JX 6(j)). On its Union Business proposal, the Union wrote the following comment:

**The Union rejects this proposal as a non-mandatory subject of bargaining. The Union is not going to bargain over changes to the internal dues/intiation fee structure of the Union Local. As to the $50 fee the Union is unable to bargain without an explanation for the expense and time that the Company would not explain.**

**We reiterate the language of the current contract.**

**Section 3.2 is in conflict with the already TA'd Section 3.6.2**

During the June 27, session, these issues were discussed at some length. Biggs-Adams questioned the $50 charge in the Company's proposal and why it took 5 to 6 hours of time to process dues. Casey Wenger explained that because dues were based on a percentage of earnings, with certain items such as auto use and expenses not included, he had to create a spreadsheet and manually back out these excluded items for each employee. Biggs-Adams continued to assert that Respondent was engaged in Union busting. She further stated that Nevin was disrespectful by not addressing her with her president title. Pautsch questioned whether bringing an ego to the table was productive. He further stated that none of the other locals that Respondent dealt with had initiation fees over $500. Biggs-Adams stated that it was none of the Company's business. Pautsch replied that the Union could jack its initiation fee up to $10,000, but Respondent would not collect it. Regarding the Company's changes to the checkoff authorization form, Biggs-Adams asserted that this was none of the Company's business, the Union was compliant with Beck, and Respondent's proposed language was not appropriate. (JX 13, pp. 12-13, JX 14, pp. 10-12; JX 15, pp. 8-10).

On August 15, 2019, the Union continued to propose the existing contract language regarding Union Security. However, on Union Business, it formally proposed to substitute an employee clock number for social security number. It also offered a counter to the Company's indemnification language by inserting that counsel would be chosen and retained by the Union.

(JX 5(j); JX 6(k)). Respondent countered the Union's counter by proposing that the counsel be selected jointly, but be at the Union's expense. (JX 6(l)).

On October 7, 2019, the parties exchanged several revised proposals regarding Union Business. They successfully resolved the indemnification language and agreed that certain language proposed by Respondent regarding notifying the Union of new hires was redundant to other language previously agreed to by the parties. The parties, however, remained apart on the substantive issue of whether the Company would collect the Union's initiation fee. (JX 6(m), 6(n), 6(o)). JX 13, p. 21; JX 14, pp. 13-15; JX 15, pp. 14-17).

2. Benefits/Health Insurance

Article 18 of the expired agreement had provided that employees would be covered by the Media General health, dental, vision, and life insurance plans under the same terms as non-represented employees. Such plans, however, were subject to amendment, except that the premiums charged to employees were fixed for the life of the contract. Unit employees were also covered by the Company's 401(k) savings plan and sick leave policy. (JX 2, pp. 24-25). When Nexstar acquired KOIN, it substituted its plans for those of Media General. (Tr. 316-317).

The parties did not begin discussing economics until January 2019. On January 24, 2019, Respondent submitted a Package Proposal (#8). With respect to Article 18, Respondent proposed:

> All Employees covered by this agreement shall be treated the same as all other station employees with respect to benefit plans and contributions to those plans. Such plans include health, dental and vision coverage, short and long term disability insurance, life insurance, 401K and other similar plans and benefits. The company reserves the right to change, modify or replace in whole or in part, the Company's insurance and benefit plans covered by this paragraph in any way as long as such changes apply equally to both bargaining unit and non represented employees of the company. Should any changes occur during the term of this Agreement, the Company shall notify the Union.

(Jt. Exh. 8(a)). At the Union's request, Respondent provided the 2019 Medical, Dental, and Vision premiums for NABET members, as well as the 2019 COBRA rates. (JX 60, 61, 62).

On January 25, 2019, the parties discussed the Company's proposal. Biggs-Adams questioned the Company's method of setting employee premiums. Pautsch explained that Respondent charged a percentage of earnings, which helped lower-paid employees. Biggs-Adams brought up an issue that would eventually forestall any agreement on medical coverage. That issue was coverage for abortion and gender dysphoria issues. Biggs-Adams stated that Nexstar's policy only covered abortion in the case of rape and incest and that this was wrong. She further related that the Union had a member whose child was going through gender reassignment, which was not covered under Respondent's plan. Pautsch stated that he would look into the issue. (JX 14, p. 2).

On April 23, 2019, the Union responded with the following proposal:

1) The members of NABET-CWA bargaining unit at KOIN-TV will be covered by the Nexstar Benefit plans. The Premiums for the Health, Dental and Vision coverage will not increase above the amounts allowed in the under the current KOIN-NABET-CWA in Section 18.2 during the term of the successor agreement.

2) The members of the NABET-CWA bargaining unit at KOIN-TV will be made whole for the amount of money (and interest that they would have earned) that was not paid into the 401(k) under the Nexstar payments from to the Tax Law windfall of 2017.

3) Nexstar will provide medical coverage for members and their dependents for gender dysphoria treatment, and all women's health services including abortion coverage.

4) During the period of the successor agreement there will be no cutbacks in medical, dental, or vision coverage provided to members of the bargaining unit.

(JX 8(b)).

On June 26, 2019, the parties briefly discussed the Company's proposal. Biggs-Adams asserted that under Respondent's proposal, employees would lose on certain benefits, such as

Holidays and Vacations. Nevin and Pautsch argued that Respondent wanted the benefits to be the same for union and non-union employees and that a "me too" provision could benefit employees if benefits were improved. (JX 14, pp. 8-9; JX 15, pp. 6-7).

On August 15, 2019, the Union presented a comprehensive response to the outstanding issues. (JX 12). Regarding benefits, the Union proposed existing contract language on holidays and vacations, and it reiterated its April 23 proposal on Article 18. (JX 12, pp. 6-8). During the bargaining session that day, Biggs-Adams raised the issue of the Trump tax cuts and a $500 windfall payment that Portland employees had not received. Pautsch stated that the issue was on the table and open for negotiation. Biggs-Adams then raised the abortion/gender dysphoria issue, stating that the Union wanted employees to have this coverage. (JX 15, p. 11).

Upon receipt of the Union's counter-proposal, Respondent submitted a written request for information to Biggs-Adams:

1. Any and all details regarding NABET local 51 membership benefits including Term Life Insurance as displayed in the attached letter dated 2/27/2019

2. Any and all details regarding NABET local 51 membership benefits including Union Member Mortgage as displayed in the attached letter dated 2/27/2019

3. Any and all details regarding NABET local 51 membership benefits including Union Rate Savings Program as displayed in the attached letter dated 2/27/2019

4. Any and all details regarding NABET local 51 membership benefits including Low Interest Mastercard as displayed in the attached letter dated 2/27/2019

5. Any and all details regarding NABET local 51 membership benefits including Health Needs Service as displayed in the attached letter dated 2/27/2019

6. Any and all details regarding NABET local 51 membership benefits including Two Legal Services Plans as displayed in the attached letter dated 2/27/2019

7. Any and all details regarding NABET local 51 membership benefits including Personal Loan Program as displayed in the attached letter dated 2/27/2019

8. Any and all details regarding NABET local 51 membership benefits including Travel Club as displayed in the attached letter dated 2/27/2019

9. Any and all details regarding NABET local 51 membership benefits including Group Health Plans as displayed in the attached letter dated 2/27/2019.

10. Any and all Welcome to NABET-CWA documents of any kind including but not limited any correspondence similar to the attached letter dated 2/27/2019 sent by NABET Local 51 to any and all KOIN TV employees from September 2017 to present.

    This information is needed to review the Unions counter proposal to CE-2, which suggests changes to the Nexstar Benefits package and the Union's counter proposal on C-6.

(JX 33).

Later that day, Biggs-Adams responded as follows:

> I am in receipt of your Request for Information — Welcome to NABET-CWA of August 15, 2019 received by email at 2:44pm. In your request you ask for information on NABET Local 51 membership benefits that are provided to individuals who decide to become members of our Union and Local.
>
> During the bargaining of the successor contract to replace the one which expired in September of 2017, we are bargaining for the wages, hours and working conditions of the members of our bargaining unit at KOIN-TV. As I am sure you should understand, those could potentially include different people, as our Union totally respects the rights of individuals who decide to pay uniform fees as Beck Objectors. Those individuals are not eligible to participate in the benefits provided by the Union Plus/Privilege program to people who are members of NABET and CWA.
>
> Therefore, your request for information, received by email at 2:44 and demanding response by close of business today August 15 is yet another example of your surface bargaining and failure to bargain in good faith.

> Additionally, you state the position that this information is needed to respond to our counterproposal on C-6 (Union Business), but sent your counterproposal at 2:35pm today, with the first version of your "Request for Information".
>
> Our Proposal CE-2 was originally provided to the Employer on April 23rd, 2019, to date you have not provided a written response. We will reiterate our questions about coverage levels, and 401(k) contributions under separate cover.

(JX 34)

On August 16, 2019, Respondent wrote back:

> **The information request you flatly failed to respond to yesterday was the fourth successive request for information that you have completely failed to respond to. This is bad faith bargaining to the highest degree.**
>
> As to your **first** refusal to furnish information upon request, the Regional Director of the NLRB found merit to the Charge we filed (Case No. 19-CB-223109) but dismissed the charge based on your assurance that the failure to supply the information was somehow inadvertent and that it was your "first offense". Despite this leniency on the Regional Director's part, you completely refused to furnish information in response to our **second** request for information. As you know the NLRB has issued a formal Complaint against this second refusal, and a hearing is set on this issue for October 8, 2019 (Case No. 19-CB-234944). You also refused to comply with our **third** request for information served on June 26, 2019 and we were forced to file a Board Charge on this as well (Case No. 19-CB-244300). This Charge is being processed by the Portland office of the NLRB and it appears a Complaint will be issued given your complete failure to respond to this well-founded information request.
>
> And now, just yesterday, you have completely refused to furnish us any information in response to our **fourth** request for information, claiming somehow that it was not relevant to look into the benefits you claim to have available to your members in the application letter you have been disseminating to our bargaining unit members, because these benefits are only available to union members. You apparently completely misunderstand our reason for asking for this information. We would like to understand what benefits are available so that we can consider possible alternatives to the Nexstar benefit plans which you take issue with. And you complain that we asked for this information by the end of the day on August 15. We set this as the response time only because it appeared from the context of the application letter that this material was readily available.

> Given this incredible recalcitrance and bad faith bargaining, it takes a lot of audacity to accuse KOIN of 'surface bargaining', when you have been flaunting the law of collective bargaining by this above-described conduct. In order to get these negotiations back on track, we need the information we have requested in these requests for information. Having these will allow us to properly address your position with a comprehensive counter of our own. We urge you to re-consider the failure to provide the requested information.

(JX 36).

Biggs-Adams responded later that same day:

> In response to your memo of August 16th, please be aware that Union Plus/Privilege programs of the AFL-CIO are only open to UNION MEMBERS. Your request for information of August 15th requests information on the plans for:
>
> 1. Term Life Insurance
> 2. Union Member Mortgage,
> 3. Union Rate Savings Program,
> 4. Low Interest Mastercard,
> 5. Health Needs Service,
> 6. Two Legal Services Plans,
> 7. Personal Loan Program,
> 8. Travel Club,
> 9. Group Health Plans,
>
> 10. And all correspondence similar to the February 27th, 2019 Welcome Letter sent to all KOIN-TV employees from September 2017 to the present.
>
> Please understand that the benefits open to UNION MEMBERS are not available to Beck Objectors (as they are not UNION MEMBERS) so those plans would not be possible alternatives to the NEXSTAR health care plans which we find to have inadequate coverage for gender dysphoria and women's reproductive health.
>
> We continue to propose that NEXSTAR provide full health care benefit coverage to all of our bargaining unit members and their dependents, and that the premiums continue to be set at the rates set forth in Section 18.2 of the currently expired but applicable contract between KOIN-TV and NABET-CWA.

> As to correspondence between NABET-CWA Local 51 and employees of KOIN-TV it is in no way germane to the health care benefits over which we are bargaining (as to rates and coverage).
>
> For those reasons we continue to decline your request for information. We continue to ask that KOIN-TV/NEXSTAR bargain in good faith for a successor agreement.

(JX 37)

The issue of health care coverage was discussed at some length on October 9, 2019. Respondent provided the 2019 SPD for Health Care. Gender dysphoria issues were not covered. Pautsch again requested information regarding the NABET plans. Biggs-Adams replied that it would be illegal to require employees to become Union members in order to participate. Pautsch responded that he was trying to be creative and they would figure out what the stipend was.[6] Respondent continued to assert that its plan provided good coverage and was liked by employees, but that it would consider alternative plans. Biggs-Adams conceded that gender dysphoria issues were rarely covered by most plans. (JX 13, pp. 26-27; JX 14, pp. 16-17; JX 15, pp. 18-19; JX 42).

On November 22, 2019, Biggs-Adams sent Pautsch the following email:

> I have been working with the Entertainment Industry Flex Plan to see if there would be coverage that they offer that could cover our bargaining unit at KOIN-TV. I am happy to report that they do have coverage available in Oregon, which includes full women's reproductive health coverage and coverage for gender dysphoria.
>
> What I do not know is how much KOIN/Nexstar will contribute toward such coverage.
>
> Since I have asked this question various times and not gotten an answer, please consider this again a request for how much Nexstar allocates for each employee in the bargaining unit for coverage of health care.

[6] This was a reference to a solution Respondent had reached with NABET in Buffalo, where the parties had taken a specific dollar amount and purchased an insurance plan that was tailored for western New York. (Tr. 392-393).

> Also please provide the COBRA Rates for Calendar 2020 for all coverages and for employees who cover only themselves, with spouse/one dependent and family coverage, in all health care types.
>
> Please provide this information as soon as possible, but in no event later than December 4th, so that we may confirm our proposal is economically feasible.

(JX 45).

Respondent responded on December 9, 2019. In its response, it initially provided charts showing the employee's bi-weekly premiums and the Company's contribution for each type of coverage. It also provided the 2020 COBRA rates for each type of coverage. (JX 47). Later in the day, it provided an updated chart that also reflected the employee and employer costs for dental and vision coverage. (JX 48). That same day, Biggs-Adams provided the SPDs for the Entertainment Industry Flex Plan, as well as the prices for coverage. (JX 49).

The bargaining sessions on December 9 and 10, 2019, were devoted almost exclusively to the topic of benefits and in particular health care coverage. There was extensive discussion of the pros and cons of the Company's plan vis-à-vis Taft-Hartley plans such as the Entertainment Industry plan. The issue of gender dysphoria was discussed and whether it might be added to Respondent's plan. In the end, however, no concrete resolution was reached. (JX 13, pp. 31, 33; JX 14, pp. 19-22; JX 16). However, the issue remained open, as reflected in Biggs-Adams' email of December 10, 2019, requesting additional information. In this email, Biggs-Adams requested the employee and employer costs under the Nexstar plan for non-represented employees. Biggs-Adams explained her request as follows:

> What we are attempting to ascertain is the amount that our members would be exposed to as a contribution if we were to accept the Employer's proposal to accept the Nexstar Coverage as proposed. Additionally, we need to know the amount of employer contribution that would be available to pay for coverage under the Flex Plan if we were to move to a Taft-Hartley Trust coverage.

> In the meanwhile we will continue to explore with our members what their desires are as to type of coverage and if they are interested in moving to the coverages provided by the Flex Plan. Please provide this information as soon as possible, but in no event later than December 13th so that we may informed decisions on the this [sic] important issue.

(JX 50).

Respondent would withdraw recognition in early January, and this information was never furnished.

3. Wages

On April 24, 2019, the Union made its initial wage proposal. Under this proposal, the minimum rates for each classification would be increased substantially upon contract ratification. The increases varied by classification, but ranged from around 22% for newly hired videographers and editors to 91% for graphic artists with between 6 and 24 months service. The proposals also created new rates for employees with more than 2 years of service. Thereafter, employees would receive 3.5% increases on the first, second, and third anniversary dates of the contract. (JX 9).

At the next meeting on June 26, 2019, Pautsch stated that the Union's April 24 wage proposal was counter-productive. He observed that the Union knew what increases the Company typically settled on. Biggs-Adams pointed out that the base minimums had not increased during the term of the expired contract. Pautsch stated that the Company would look at that issue, but that industry revenues were declining, the rates were always based on a percentage, and that "we bargain these rates very very hard." Biggs-Adams disputed the assertion that revenues were declining and stated that Nexstar had plenty of money. (JX 13, p. 9; JX 14, p.8; JX 15, p. 6)

Wages were not discussed again until the end of the December 10, 2019, meeting, following extensive discussion of benefits. Pautsch suggested that the Union make a better wage offer. Biggs-Adams replied that she was not going to bargain against herself. Pautsch referenced

his negotiations in Buffalo where the Union had come in with a proposal of 3%, 2%, and 2%. Pautsch stated that the Company was not going to agree to that, but that it was far more reasonable than the Union's initial offer and that he had settled contracts in the range of 1% to 1.5%. Biggs-Adams raised the issue of in-hire rates, and Pautsch replied that the Company would look at that issue. (JX 13, pp. 33-34; JX 14, p. 22; JX 16; Tr. 264-265).

G. Company Withdraws Recognition, Grants Wage Increase, Removes Union Bulletin Boards.

On January 8, 2020, Respondent advised the Union in writing that it was withdrawing recognition from the Union in both bargaining units previously represented by the Union. The withdrawal of recognition was based primarily on oral disaffection statements made by employees to management, as well as other indicia of lack of support for the Union. [7] What the record reflects is that employees were dissatisfied with the representation provided by Local 51 and Biggs-Adams and were looking to replace Local 51 with IATSE. Many of these statements are reflected in a December 18, 2019 email from Rick Brown to Pat Nevin:

> I was speaking with Douglas Key and he brought up to me that him and a group of other people were not happy with Carrie Biggs-Adams about how the negotiations were going. Douglas told me, they spoke to Carrie that they were looking at getting rid of NABET and then after a year they would look at bringing in IATSE. Douglas did mention to me that they probably would lose some things during that time, but it was better than keeping NABET. Douglas said, right now they have 12 yes votes and he stated that they only need 19 to make it pass. He also mentioned that by getting the union out for the year, that people who were being protected by the union for poor job performance should not be protected and should leave.
>
> On a follow up conversation with Douglas, he told me that he and Brian Watkins were working on getting a vote setup in January to decertify. Douglas said that all the photogs except Ellen and Robert were against the union, especially the new photographers.

[7] Respondent's position statement is in the record as GCX 19.

> Vivian Coday and Levan Funes asked me how to get the union out of the station and who to ask about getting the cards to pass around to decertify. I gave them the number for the Right to work attorney.
>
> Chris Thibodaux told me that he does not like the union here and will not pay their initiation fees and dues. He does not want them here and does not support the union.
>
> Jahaad Harvey came to me asking why Carrie was sending out a letter stating that he needed to pay dues after the company stopped taking the money out of the checks. Jahaad had never paid before the letter either. He asked me if he must pay the dues because he did not support the union and wanted it out.
>
> Tom Westarp spoke to me and wants the union out. He said that he has been talking with Douglas on the situation above.

(RX 6).

Rick Brown and Douglas Key both testified at the hearing. Key testified that he had multiple conversations with Brown in which he told him about his conversations with other employees who were dissatisfied with the Union. Based on his recall at the time of the hearing, he specifically identified Chris Thibodeaux, Brian Watkins, William (Bill) Cortez, John (Karl) Peterson, Cambrie Juarez, Robert Sherman, Andrew Bissett, and Richard Roberson as having made statements that they wanted the Union out. (Tr. 765-776). Brown verified the statements made to him that are set forth in his email. He testified that he personally had conversations with Douglas Key, Tom Westarp, James Boehme, Vivian Coday, Levan Funes, Chris Thibodeaux, Karl Peterson, and Jahaad Harvey in which they stated dissatisfaction with the Union and their desire to get the Union out. (Tr. 808-817). In addition, Pat Nevin testified that he had a conversation with Christian Montes in which he stated his dissatisfaction with the Union and asked how he could get it out. (Tr. 802).

Since January 8, 2020, Respondent has refused to recognize the Union as the exclusive bargaining representative of employees in the two units or meet for bargaining. (JX-1, ¶ 18; JX-

55). That same day, Respondent removed the Union bulletin boards at its facility. Respondent did not notify the Union of this decision. (JX-1, ¶ 19). Respondent also notified its employees in the two units that they would soon be receiving a 1.5% wage increase. Respondent did not notify the Union of this decision. (JX-1, ¶ 20). On or about March 25, 2020, Respondent implemented a 1.5% wage increase, retroactive to January 1, 2020. Respondent did not notify the Union of this decision. (JX 1, ¶ 22).

H. Miscellaneous Alleged Unilateral Changes

On or about November 24, 2019, and again on February 2, 2020, Respondent assigned the work of shooting video at Portland Trailblazers games to an individual who was not in either bargaining unit. Respondent did not notify the Union of this decision. This related to Executive Producer Travis Teich acting as a videographer for the sports reporter at a basketball game. According to Robert Dingwall, this had never occurred before. (JX 1, ¶ 17; Tr. 511-513; GCX 17, GCX 18). Article 12.4 of the expired contract states: "There is no restriction on managers and/or supervisors performing bargaining unit work. Use of this provision shall not lead to managers and/or supervisors permanently replacing NABET represented employees." (JX 2, p. 13). Neither party had proposed to modify this language during the 2017-2019 negotiations.

In 2019, Respondent had permitted two Unit photographers to request vacation on July 4-7, 2019 (which happened to be the dates of the Summer 2019 Portland Waterfront Blues Festival). On or about January 6, 2020, Respondent announced that it would only permit one Unit Photographer to request vacation on July 2-5, 2019 (the scheduled dates of the Summer 2020 Portland Waterfront Blues Festival, which was later cancelled). Respondent did not notify the Union of this decision. (JX 1, ¶ 21; Tr. 470-473, 506-507).

I. Alleged Section 8(a)(1) Violations

Paragraph 16 of the Second Consolidated Complaint, as amended, alleges that Respondent, through Rick Brown, violated Section 8(a)(1) of the Act in the following respects: (a) On January 20, 2020, Brown, in Respondent's newsroom, told employees they should not talk about the Union; (b) On January 23, 2020, Brown, in Respondent's newsroom, told employees they could not hand out Union bulletins because Respondent no longer recognized the Union; (c) On June 25, 2020, Brown, during a Zoom call with an employee, instructed employees not to discuss wages and wage increases; (d) On June 25, 2020, Brown, during a Zoom call with an employee, made an implied threat to revoke wage increases if employees discussed their wage increases with each other.

Ellen Hanson testified that on January 20, 2020, she was getting coffee and speaking to new employee Travis Box. Hanson asked Box what he thought of the Union, and he replied that he was waiting for the dust to settle. At that point, Brown walked up and said that he did not think they should be talking about that. Hanson responded that they were getting coffee. Box and Brown both departed at that time. (Tr. 464-466; GCX 11).

Hanson further testified that on January 23, 2020, while she was on break, she approached Neil Sparks, handed him a Union Bulletin, and asked him to give it to another employee. As she was walking back downstairs, Brown asked to speak to her. They stepped to a side area, and Brown told Hanson that she should not be handing out bulletins because Respondent was not recognizing the Union. (Tr. 466-468; GCX 12). Brown testified, but was not questioned regarding this conversation.

Robert Dingwall testified that he received a performance review from Rick Brown in the spring of 2020. The review occurred over Zoom. At the end of the review, Dingwall asked why he had only received 1% when others received 2%. According to Dingwall, Brown became angry,

stated that employees were not supposed to be talking about raises, and that he knew who Dingwall had talked to and he (Brown) would be getting with that person. Brown further stated that he could revoke the increases if he so desired. (Tr. 513-514). Brown testified, but was not questioned regarding this conversation.

## ARGUMENT

A. The Decision To Withdraw Paragraphs 9 And 11 Of The Second Consolidated Complaint Was Exclusively Within The General Counsel's Discretion.

Paragraph 9 of the Second Consolidated Complaint made the following allegations:

> (a) At all material times from March 23, 2019, through December 10, 2019, Respondent opposed the Union's proposal regarding union security without a legitimate business justification.
>
> (b) On about April 23, 2019, the Union requested that Respondent bargain about the Units' wages.
>
> (c) Since on or about March 23, 2019, Respondent has failed and refused to bargain collectively about the subjects set forth above in paragraphs 9(a) and 9(b), including by failing to make proposals related to those issues.
>
> (d) The subject(s) set forth above in paragraphs 9(a) through 9(c) relate to the wages, hours, and other terms and conditions of employment of the Units and are mandatory subjects for the purposes of collective bargaining.

Paragraph 11 of the Second Consolidated Complaint alleged:

> (a) Since on or about June 27, 2019, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to change its dues and initiation fee structure.
>
> (b) The condition described above in paragraph 11(a) is not a mandatory subject for the purposes of collective bargaining.
>
> (c) Since on or about June 27, 2019, in support of the condition described above in paragraph 11(a), Respondent has linked non-mandatory subjects with mandatory subjects, including Union Security, and demanded that the Union bargain over the non-mandatory subjects if Respondent were to reach agreement on the mandatory subjects.

On November 9, 2020, three days prior to the opening of the hearing, the General Counsel notified the Judge and the parties:

> Please also be advised that at the direction of the General Counsel, we will be withdrawing paragraphs 9 and 11 of the Further Consolidated Complaint at the opening of the hearing on Thursday. I apologize for this change in pleading in such close proximity to the trial date.

And in fact, when the hearing opened, prior to the introduction of any evidence, the General Counsel followed through and formally sought to withdraw paragraphs 9 and 11 of the Second Consolidated Complaint. (Tr. 17). On the second day of the hearing, however, the Judge advised the parties that she was reconsidering whether to permit the withdrawal of these complaint allegations. (Tr. 203-205).

Section 3(d) of the Act provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." This authority extends not only to the issuance of complaints, but also to the withdrawal of complaints. *International Assoc. of Machinists & Aerospace Workers v. Lubbers,* 681 F.2d 598, 601 (9th Cir. 1982). "The legislative history of section 3(d) confirms that the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court." *Id.* at 603. "At some point, however, a complaint may be said to have advanced so far into the adjudicatory process that a dismissal takes on the character of an adjudication, and at that point the General Counsel no longer possesses unreviewable authority in the matter." *Sheet Metal Workers International Assoc., Local Union 28, (American Elgin),* 306 NLRB 981, 982 (1992). While "[t]he exact dividing line is not made plain in the text of the Act," the Board has held that where "the hearing has opened but no evidence has been introduced, discretionary authority to withdraw the complaint lies with the General Counsel." *Id.* Such is the case here.

Thus, prior to the opening of the hearing, the General Counsel gave notice that he was withdrawing paragraphs 9 and 11 of the Second Consolidated Complaint. On the first day of the hearing, prior to the introduction of any evidence, the General Counsel formally withdrew these allegations. Given the General Counsel's unreviewable discretion, and the timely withdrawal of paragraphs 9 and 11, Respondent respectfully contends that it is not within the purview of either the Judge or the Board to pass on what is a purely prosecutorial decision. Paragraphs 9 and 11 of the Second Consolidated Complaint no longer exist. It is as if they had never been pleaded in the first place.

B. The Union's Own Bad Faith Precludes Any Testing Of The Respondent's Good Faith. Respondent's Conduct Must Be Evaluated In The Context Of The Union's Own Conduct.

Although there are no complaint allegations pending against the Union, Respondent has raised the Union's own bad faith as an affirmative defense to the General Counsel's allegations of bad faith bargaining on the part of Respondent. It is well settled that a union's bad faith bargaining constitutes a valid defense to allegations of bad faith on the part of the employer. The seminal case in this area is *Times Publishing Co.,* 72 NLRB 676 (1947), where the Board stated:

> The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that . . . a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.

72 NLRB at 683.

That the General Counsel settled certain charges, and dismissed other charges, filed by Respondent merely precludes the Board from issuing an "order" against the Union. It does not eliminate or preclude Respondent's defense. *E.g., Chicago Tribune Co.,* 304 NLRB 259, 260

(1991); *Martel Construction, Inc.,* 302 NLRB 522, 522 (1991). As the Board, in *Chicago Tribune,* stated:

> "[A] party is privileged to present, and the judge is bound to hear, receive, and consider its defense, notwithstanding the fact that the General Counsel had previously considered the same evidence in refusing to issue an unfair labor practice complaint." [Citation omitted]. This due-process requirement does not interfere with the General Counsel's nonreviewable Section 3(d) complaint authority. Even if the Board's finding of merit in an affirmative defense entails a finding that an uncharged party has committed an unfair labor practice, the Board has no authority to issue an order directly against that party or to order the General Counsel to reconsider prior disposition of a unfair labor practice charge against that party. This rationale is equally applicable to situations in which the party alleging an unfair labor practice in an affirmative defense has not previously filed a charge or has withdrawn a charge prior to disposition by the General Counsel.

304 NLRB at 260.

The Board, in a number of cases, has found that a union's bad faith bargaining precluded any testing of the employer's good faith. For example, in C*ontinental Nut Co.,* 195 NLRB 841 (1972), the General Counsel alleged an extensive pattern of overall, bad faith bargaining by the employer by "delaying the commencement of negotiations, unilaterally instituting its entire economic and non-economic package, insisting upon terms giving it control over most of the working conditions, failing to make a proposal in writing on union security and then making a written union security offer that was less than what it had offered orally and lastly, offering in a final written proposal items which retracted previous agreements, diminished previous offers and purposely irritated and divided the Union." *Id.* at 857-858. In rejecting these allegations, the ALJ (adopted by the Board) noted that there "remains to be considered the conduct of the Union in the entire course of negotiations." He then found that the union had "repudiated prior agreements on specific items" and had taken an intransigent position during bargaining that "[i]t is up to the Company to concede and the Union to reject." The judge then opined:

> The Union's refusal to bargain in good faith to and through October 10, 1969 removed the possibility of negotiation and precluded the existence of a situation in which Respondent's good faith could be tested. Since it cannot be tested it cannot be found.

*Id.* at 868.

In *Southwestern Portland Cement Co.,* 289 NLRB 1264 (1988), the ALJ (adopted by the Board) found that the employer implemented its final offer without reaching a bona fide impasse. Nevertheless, he found no violation in this unilateral implementation because of the union's own bad faith. In particular, the union engaged in a course of conduct aimed at prolonging the negotiations and avoiding implementation of a contract that was deemed undesirable. The union's conduct included not only delay, but substituting an unprepared negotiator and failing to give the union committee a copy of the employer's final offer until six weeks later when the parties next met.

In *Serramonte Oldsmobile,* 318 NLRB 80 (1995), *enf'd in pert. part,* 86 F.3d 227 (D.C. Cir. 1996), the ALJ (adopted by the Board) found that the employer lawfully implemented its final offer in spite of the absence of impasse:

> Herein, counsel for Respondents argues that the Union's entire course and conduct, prior to the start of collective bargaining and during the instant negotiations, evidenced "a legal strategy to obstruct negotiations," one grounded in the tactics of avoidance and delay, and I find merit in these contentions.

*Id.* at 100.

In *Asociacion Hospital Del Maestro, Inc.,* 317 NLRB 485 (1995), the ALJ (adopted by the Board) found that the union engaged in bad faith fragmented or piecemeal bargaining thereby precluding any testing of the employer's good faith in making regressive noneconomic proposals and justifying the implementation of the employer's final offer. In particular, the union refused to

discuss economics until after complete agreement was reached on noneconomic issues. The ALJ opined:

> When they finally came to the economic article, the Union refused to negotiate or even discuss it and insisted falsely that there had been prior agreement to negotiate and agree on all noneconomic articles first. The Union's strategy was transparent. It knew that and expressed that it would never agree on any kind of economic concession and that any economic negotiation would result in an impasse which would allow Respondent to implement concessions. By stalling negotiations until after agreement on economics, it thus deferred possible economic reductions.

*Id.* at 517. *See also, Bridon Cordage, Inc.,* 329 NLRB 258, 329 (1999) (unlawful fragmented bargaining); *Walter A Zlogar, Inc.,* 278 NLRB 1089, 1094 (1986) ( union agent's lack of authority to negotiate an agreement without the approval of the Union's "executive group," the delay in reaching any agreement until "Cedar Rapids settled," and union favoritism toward Respondent's competitors, suggest lack of good faith by the Union itself); *Roadhome Construction Corp.,* 170 NLRB 668, 672 (1968) (take-it-or-leave-it bargaining by union).

Here, Respondent contends that the allegations against the Company must be evaluated in the context of the Union's own conduct. The Union's specific bad faith conduct is discussed below in conjunction with the specific allegations made against Respondent. This conduct either mitigates Respondent's alleged conduct or precludes a testing of the Company's own good faith.

C. Respondent Did Not Regularly Defame And Denigrate The Union.

Paragraph 8(a) of the Second Consolidated Complaint, as amended, alleges that "Since about March 23, 2019, Respondent has regularly defamed and denigrated the Union to its Unit Employees via its bargaining update memos to employees." Respondent contends that this allegation is without merit. Further, Respondent's updates were largely responsive to the Union's own bargaining memos, which were highly critical and derogatory of the Company. Respondent contends that both parties' communications with employees were protected by Section 8(c), were

a bona fide form of economic warfare, and are not indicative of bad faith. However, to the extent that the Board finds that any of Respondent's communications, in isolation, would violate the Act, the Union's communications were equally violative and preclude any finding of bad faith by Respondent.

"It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations." *Trailmobile Trailer, LLC,* 343 NLRB 95, 95 (2004). "Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). "Thus, an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development,* 347 NLRB 35, 35 (2006) ) (no violation in issuing critical memo stating, "I believe that for months now, the Union has been doing everything in its power to harm Children's Center for Behavioral Development," as "Respondent's memo conveys nothing more than the Respondent's negative opinion of the Union's actions"). In general, merely disparaging remarks are not unlawful if they do "not suggest that the employees' union activity was futile, d[o] not reasonably convey any explicit or implicit threats, and d[o] not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights." *Trailmobile,* 343 NLRB at 95.

Further, "[a]s a matter of settled law, Section 8(a)(5) does not, on a *per se* basis, preclude an employer from communicating, in noncoercive terms, with employees during collective-bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith." *Proctor & Gamble Mfg.*

*Co.,* 160 NLRB 334, 340 (1966). It is not unlawful for an employer to communicate with its employees regarding the status of negotiations or to express frustration with the Union's bargaining position. As the Board opined in *United Technologies Corp.,* 274 NLRB 1069 (1983):

> In our view, an employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations. An employer is not required to watch passively as a union conducts "public" negotiations through one-sided distributions which denigrate the employer, raise expectations, and engender fear that the employer's position is sinister or unfair. Furthermore, we believe that free and open discussion by all parties to the collective-bargaining process affords the best chance for successful conclusion of negotiations and creates the most favorable climate for successful bargaining. Indeed, employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues. We believe employees are fully capable of evaluating the relative merits of those positions for themselves.

*Id.* at 1074.

"Direct dealing" [8] violates § 8(a)(5), but "[t]o find a violation, our law requires (among other things) that the employer have engaged in a discussion with the employee that was for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the union's role in bargaining." *Alta Vista Regional Hosp.,* 355 NLRB No. 43 (2010). "The criteria to be applied in determining whether an employer has engaged in direct dealing are: (1) was the employer communicating directly with union-represented employees; (2) was the discussion for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or under-cutting the union's role in bargaining; and (3) was such communication made to the exclusion of the union." *Alan Ritchey, Inc.,* 346 NLRB 241, 243 (2006).

Respondent's 2019 bargaining updates went out over the signature of Nevin; however, they

[8] The Second Consolidated Complaint, as amended, does not explicitly allege that Respondent engaged in "direct dealing" through its negotiation bulletins.

were all penned by in-house Counsel Pautsch. While these communications were direct and hard hitting, they did "not suggest that the employees' union activity was futile, d[id] not reasonably convey any explicit or implicit threats, and d[id] not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights." *Trailmobile,* 343 NLRB at 95. Nor did they seek to bypass the Union or deal directly with employees.

Further, these communications were largely responsive to Union communications, which criticized Respondent's proposals, and at times openly defamed and denigrated Respondent and its negotiators. Thus, in her January 25, 2019 Bulletin, Biggs-Adams diminished and mischaracterized Respondent's proposals that had been presented in January. She characterized these proposals as "anti-union" and stated that the Union was "getting ready to take our mobilization public (many of you have been contacted about the plans)." (JX 17, pp. 33-34). Nevin's March 5, 2019 Update was responsive to the Union's Bulletin and explained the basis for Respondent's proposals. (JX 21). Similarly, Nevin's May 31, 2019 Update (JX 25) was responsive to Biggs-Adams' April 24, 2019, Bulletin (JX 17, p. 36). Nevin also responded to the Union's "mobilization" efforts:

> It is also important to note we have recently been advised Ms. Biggs Adams has taken another odd and unprofessional approach in our ongoing negotiations. In what appears to be a similar tactic as she used back in 2015, Ms. Biggs Adams is attempting to create controversy with loyal KOIN advertisers with a written request to have clients stop advertising on our Station. Last weekend, she followed up on this letter by showing up at one of advertisers [sic] retail location, setting up a large banner calling for their customers not to patronize this business. This tactic is terribly wrong on a number of levels and ultimately will only serve to hurt our efforts to build a best in market Media Company.

Nevin's June 20, 2019 Update was also directly responsive to the Union's public efforts to put economic pressure on Respondent. Nevin described the Union's bannering of an advertiser and the adverse impact that such activities could have on the Company's business and the employee's

jobs. (JX 26).

In a series of Bulletins in June and July 2019, Biggs-Adams ratcheted up her attacks on Respondent and its management team. In her June 26, 2019, Bulletin, Biggs-Adams once again, as she had on many occasions in the past, accused the Company of "union busting." She referenced the Union's various unfair labor practice charges against Respondent and the Union's efforts to go after KOIN advertisers. She also personally attacked the Company's executives:

> Wages - we believe that your wages haven't gone up enough in the last few years (and not at all since July of 2016) and the minimum rates are not high enough. A few percent is not enough to get each of you anywhere near the wage you should get for the work you do, at a station which is part of a chain with enough resources to buy Tribune TV stations for more than $6.4 BILLION. Perry Sook (and Tim Busch, along with other executives) sought an increase from the shareholders again at this year's meeting - the shareholders voted AGAIN to reject the increase. When your hedge fund owners think that your executive wages are too high, it is time to look at the fact that your CEO makes too much (302 times the average of $48,301 of workers at Nexstar) - $19.3 million in 2017, $14.6 in 2018. See Dallas Morning News coverage here:
> https://bit.ly/2xbZtSB
>
> 'They've got serious reservations': Nexstar shareholders reject CEO's pay for second straight year is the title of the article on coverage of the June 5th shareholders meeting. I attended again, suggesting that they should be paying the $90 million in obligations to prior pension plans (including the one from Media General) before funding a new stock option plan, which they propose all 9,000 employees are eligible for. Since we are still trying to get the money that they gave non-union people in the windfall from the Trump Tax Cut for you (both 401(k) funds and the $500 bonus paid to each non-union worker - it is hard to trust them to share.

(JX 17, p. 37).

In her June 27, 2019 Bulletin, Biggs-Adams further criticized the Company proposals and stated that the Union would continue to fight Respondent's "corporate greed." (JX 17, pp. 39-40). In her July 5, 2019 Bulletin, she continued to assert that KOIN was engaged in Union busting and

that the Union's "mobilization" campaign was a good tactic that would lead to successful results. (JX 17, p. 41).

As Biggs-Adams amped up her attacks on KOIN and its management, the Company responded with Nevin's July 22, 2019 memo. To be sure, this memo was more personal in its message, and raised detailed questions about the wisdom of Biggs-Adams' bargaining approach, questions to which Nevin suggested that employees should seek answers. In the context of Biggs-Adams' broadside attacks on KOIN and its management, however, Nevin's memo did not exceed the bounds of § 8(c) and good faith bargaining. The parties were engaged in a form of economic warfare that the Act protects, and the Respondent was not toothless, bound to stand by and take it without comment. (Tr. 636-641). "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap v. Hale,* 463 U.S. 491, 500 (1983). Collective bargaining "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one," *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 488 (1960), and the Board does not function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." *Id.* at 497. The ongoing communication battle between Respondent and the Union was as much a weapon as a strike or lockout.

Nevin's August 20, 2019 memo primarily addressed questions regarding the Company's decision (inasmuch as the CBA had been terminated) to cease checking off Union dues. Nevin explained the Company's position regarding the Union's exorbitant initiation fees and compared them to the far lower fees charged by other local unions with whom Nexstar dealt. (JX 38).

On September 27, 2019, Biggs-Adams sent out a letter to KOIN employees who had not become Union members. In this letter, Biggs-Adams advised employees that the Union Executive

Board had voted to waive initiation fees for any employee who joined the Union in the month of October:

> The Executive Board of Local 51 votes to waive the initiation fee for members of the bargaining unit at KOIN-TV for applications submitted during the month of October 2019. New members shall immediately begin paying dues on their earnings for the month of October 2019, shall continue to pay their dues in a timely manner, shall sign a dues checkoff form that will be effective when a new contract is in place, and shall remain members in good standing of NABET during their employment at KOIN-TV or any other NABET represented workplace.

(JX 40).

On October 14, 2019, Nevin sent out an Update responding to the Union's waiver offer. Nevin characterized the waiver offer as "fools gold" and "trickery." He questioned whether the Union might attempt to make up the difference by raising dues. He further asserted that the offer discriminated against all employees who had previously been required to pay the initiation fee. Nevin stated that the Company would be filing an unfair labor practice charge against the Union. (JX 43).

Whatever one may think of the critical tone of Nevin's memos, they do not exceed the bounds of § 8(c). There were no threats of futility and no harassment. Rather, the memos reflected Respondent's view of the dynamics that were hindering bargaining, laid out the basis for Respondent's proposals, and sought to refute the information that Biggs-Adams was conveying in her Bulletins. Respondent requests that the allegations in paragraph 8(a) of the Second Consolidated Complaint be dismissed.

D. Respondent Did Not Refuse To Meet and Bargain At Reasonable Times And Places.

Paragraph 8(b) of the Second Consolidated Complaint, as amended, alleges that "Since about March 23, 2019, and specifically in May and July 2019, Respondent has failed to meet and bargain with the Union for a successor to the Expired CBA, without explanation." Paragraph 8(c)

alleges "Since about March 23, 2019, and specifically in January of 2020, Respondent has failed and refused to meet at reasonable times and/or places for bargaining." More specifically, it is alleged that "On about January 8, 2020, Respondent canceled the bargaining sessions scheduled for January 23 and 24, 2020; and "On January 14 and 15, 2020, Respondent double-booked its representatives for bargaining in another state on the same dates it had previously agreed to meet with the Union, and then cancelled its agreed-upon bargaining sessions with the Union in reliance upon its own double-booking."

Section 8(d) of the Act requires the parties to "meet at reasonable times and confer in good faith," but the Act does not impose any specific timetables, and the Board has never taken a per se approach to this issue. "While the Board has not developed a hard and fast rule with regard to the number, frequency, and duration of meetings between the parties, it looks to the parties' conduct to determine if there was a subjective willingness to reach an agreement." *Sheraton Anchorage,* 359 NLRB 803, 843 (2013). "The cancellation of bargaining sessions is an indicia of a failure to bargain in good faith, although ordinarily much more than a single, isolated cancellation of a bargaining meeting is required before a violation is found." *Brooke Glen Behavioral Hospital,* 365 NLRB No. 79 (2017). In general, there must be evidence "that the cancellations were unjustified or were intended to impede bargaining progress." *See Inter-Polymer Industries, Inc.,* 196 NLRB 729, 762 (1972).

Here, the evidence is insufficient to establish any bad faith by Respondent in either the scheduling or cancellation of meetings. Indeed, it appears that the parties' problems in reaching an agreement were substantive and wholly unrelated to the number of meetings. The mediator herself frequently questioned why the parties were meeting when no real progress was being made. (Tr. 260). The parties continually re-plowed the same ground. Although Biggs-Adams testified that

Respondent did not want to meet during "sweeps months," (Tr.108, 148, 169, 225) [9], she later on cross-examination changed her testimony to "sweeps weeks." (Tr. 317-318). The fact is that there were three schedules that had to be accommodated: Respondent's, the Union's, and the Mediator's. All were busy and all had weeks where they could not meet. For example, the parties had scheduled meetings for March 14 and 15, 2019. However, on February 6, 2019, the Mediator notified the parties that she had to "attend a mandatory meeting in Seattle on March 14 & 15" and would need to reschedule the bargaining dates. She suggested other dates in late March and indicated that she also had some dates in April. This led to back and forth communications trying to pin down dates. The mediator and the Union were available March 28 and 29, but Respondent was not available. Respondent then stated that it was open from April 1 through April 12 and asked if there were 2 consecutive days the Union and Mediator could meet. Biggs-Adams responded that she was "booked the whole first week of April in a trial, and at NAB and a conference in Las Vegas the following week (April 8 through 13)." Biggs-Adams stated that she was available April 15, 16, 22-26, and April 29-May 3. This resulted in the parties agreeing to April 23 and 24. This is not a "busy negotiator" defense. Rather, it is the reality of accommodating three sets of schedules. By all appearances, all parties worked diligently to find mutually agreeable dates to meet. (Tr. 325-326). When one set of dates was ruled out, they looked for other dates. The record simply will not support a finding that Respondent thwarted negotiations by arbitrarily refusing to meet on a regular basis. Respondent requests that paragraph 8(b) of the Second Consolidated Complaint be dismissed.

[9] Biggs-Adams conceded that Respondent never stated that they would not meet during sweeps months and that this was just an assumption on her part. (Tr. 172).

The same is true with respect to the cancellation of the January 14 and 15, 2020 meetings. While it is clear that Biggs-Adams legitimately "believed" that the parties had mutually agreed to meet on those dates and had booked rooms based on that belief, (Tr. 225, 267), it appears that there was confusion when the October meetings ended, that the parties had caucused at the behest of the Mediator, and that possible dates may have been conveyed back and forth between the Mediator and the parties. (Tr. 276-277, 333-335). In any event, even if in fact the parties had committed to meet on January 14 and 15, 2020, and even if Respondent bore sole responsibility for cancelling these meetings, the record falls far short of establishing "bad faith." Pautsch "cancelled" the January meetings on December 10, a full month before the meetings were set to occur, explained the basis for the cancellation (unexpected effects bargaining in Buffalo), and immediately offered alternative dates of January 23 and 24, which everyone accepted. There was no adverse impact on bargaining and no bad faith. Respondent requests that this allegation in paragraph 8(c) of the Second Consolidated Complaint be dismissed.

As for the cancellation of the January 23 and 24 meetings, that followed inexorably from Respondent's decision to withdraw recognition on January 8, 2020. Respondent could hardly withdraw recognition and yet continue to bargain with the Union. This allegation rises or falls with the lawfulness of Respondent's withdrawal of recognition.

E. Respondent Did Not Refuse To Bargain Over Health Insurance.

Paragraph 10 of the Second Consolidated Complaint, as amended, alleges that "From about April 24, 2019, until December 2019, Respondent delayed in responding to the Union's proposal on health insurance for its Units' employees" and that "Since on or about April 24, 2019, Respondent has failed and refused to bargain collectively about" the subject of health insurance.

This is yet another puzzling allegation found in the Second Consolidated Complaint, as amended. Respondent was the first to make a proposal on health insurance, when it made its package proposal # 8 on January, which proposed that employees be covered under Respondent's corporate health insurance plan under the same terms and conditions as non-represented employees. This was the same plan under which unit employees were already covered, but premiums had been fixed for the life of the contract. The parties discussed this proposal again on January 25, 2019. On April 23, 2019, the Union made its first proposal on health care. NABET proposed coverage under Nexstar's plan, but sought to fix employee premiums, prohibit any reductions in coverage during the term of the contract, and add coverage for abortion and gender dysphoria care. Thereafter, the parties would discuss the issue of health care on June 26, August 15, October 9, December 9, and December 10, with the last two sessions being devoted almost exclusively to health care. Throughout the negotiations, Respondent expressed its preference for the Nexstar plan, but it also offered to consider other plans, which might include gender dysphoria/abortion coverage. (Tr. 394-395, 608-613). The parties' inability to reach an agreement on health care had nothing at all to do with a failure to discuss or bargain and everything to do with their inability to bridge the abortion/gender dysphoria issue, which was clearly an issue of immense personal importance to Biggs-Adams. (Tr. 98-100, 602-604). The Union certainly was entitled to hold firm on that issue, but it made agreement nearly impossible. Few plans provided such coverage, and those that did were not financially feasible.

The record clearly fails to support the allegations in paragraph 10 of the Second Consolidated Complaint that "From about April 24, 2019, until December 2019, Respondent delayed in responding to the Union's proposal on health insurance for its Units' employees" and that "Since on or about April 24, 2019, Respondent has failed and refused to bargain collectively

about" the subject of health insurance." Respondent requests that these allegations be dismissed for lack of proof.

Further, even apart from the absence of proof, these allegations fail because the Union consistently and repeatedly refused to furnish relevant information requested by Respondent. In an effort to consider alternative plans, Respondent requested relevant information on the Union's benefit plans, including its health care plan. Biggs-Adams adamantly refused to furnish this information on the grounds that the Union's plan was only available to Union members, and could not be offered to employees who were only financial core members. But this was not a valid objection. The information requested related directly to bargaining unit employees and thus was presumptively relevant. Further, by raising the issue of abortion/gender dysphoria coverage as an issue and objecting that Nexstar's plan did not provide such coverage, the Union made its own plan relevant. As the Company explained in Nevin's August 16, 2019 email to Biggs-Adams: "We would like to understand what benefits are available so that we can consider possible alternatives to the Nexstar benefit plans which you take issue with." And when Biggs-Adams repeated her objection on October 9, Pautsch responded that he was trying to be creative and they would figure out what the stipend was. This was a reference to Biggs-Adams' request to know how much money she had to spend on a different plan. At no point in the negotiations did Biggs-Adams alter her position, and the Union never furnished the requested information. This clearly constituted bad faith on the part of the Union.[10] Given the Union's refusal to furnish relevant information on the

[10] Respondent filed a charge based on the Union's refusal to furnish this information. The General Counsel found merit to the charge. Thereafter, the General Counsel entered into a unilateral settlement agreement with the Union. Under the terms of this agreement, the Union is obligated to furnish the requested information in the event that future bargaining occurs.

subject of health care, it is impossible to test the Respondent's good faith in bargaining over this very topic.

F. Respondent Did Not Engage In Surface Bargaining.

Paragraph 12 of the Second Consolidated Complaint, as amended, alleges that since about June 21, 2017, Respondent has engaged in overall bad faith surface bargaining by "engag[ing] in bargaining with no intention of reaching agreement (surface bargaining); insist[ing] upon proposals that are predictably unacceptable to the Union; refus[ing] to meet at reasonable times and/or places for bargaining; condition[ing] negotiations on non-mandatory subjects of bargaining; and denigrat[ing] the Union in the eyes of the Units' employees." This allegation is without merit.

The Act compels good faith bargaining, not agreement, and the failure to reach an agreement is not indicative of bad faith. Surface bargaining, however, is a course of conduct marked by the absence of a "sincere desire" to negotiate the parties' differences and arrive at a contract. The Board looks at the totality of circumstances, including "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meeting[s]." *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). Allegations of surface bargaining against one party cannot be evaluated without reference to the other party's conduct, *Flying Foods*, 345 NLRB No. 10 (2005), enf'd, 471 F.3d 178 (D.C. Cir. 2006), and when the union takes an intransigent position regarding its own proposal, it cannot be heard to complain that the employer takes an equally firm position with regard to its proposal. *Unocal Apparel, Inc.,* 208 NLRB 601, n.1 (1974), enf'd, 508 F.2d 1368 (5th Cir. 1975).

"From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). An employer is entitled to bargain hard for an agreement it deems "favorable to itself" and "[i]t is well settled that working toward such an end evinces not surface but hard bargaining." *Litton Microwave Cooking Products,* 300 NLRB 324, 330 (1990), enf'd, 949 F.2d 249 (8th Cir. 1991).

Although the Board, in assessing surface bargaining allegations, examines the totality of a party's conduct, including unlawful conduct occurring away from the bargaining table, the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." Instead, "away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party's conduct at the bargaining table itself indicates an intent [not] to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining." Id.; *accord, St. George Warehouse, Inc.*, 341 NLRB 904, 907 (2004), enf'd, 420 F.3d 294 (3d Cir. 2005). Where the misconduct away from the table does not appear to influence the course of bargaining at the table, it lacks significant probative value. *Flying Foods,* 345 NLRB No. 10 (2005); *River City Mechanical*, 289 NLRB 1503, 1505 (1988).

While the Board has authority to examine the parties' substantive proposals in order to determine whether they indicate an intent to thwart agreement, this is a slippery slope. "[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon

the substantive terms of collective bargaining agreements." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403 (1952). It cannot judge the merits of any proposal or declare a proposal to be "unacceptable," unless of course the proposal is facially unlawful. The Board's inquiry into substantive proposals must be limited to an inquiry as to whether the proposal was made or insisted upon because the party honestly was desirous of achieving such a provision (good faith) or was used merely to create an impediment to an agreement (bad faith). "That we will read proposals does not mean, however, that we will decide that particular proposals are either 'acceptable' or 'unacceptable' to a party." *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988), enf'd pert. part, 906 F.2d 719 (D.C. Cir. 1990).

The Supreme Court as early as 1952 explicitly rejected the notion that the Act compelled bargaining for fixed, as opposed to discretionary, terms of employment. Rejecting the Board's prior position that an employer's insistence upon a management functions clause was unlawful, the Court explained:

> The Board was not empowered so to disrupt collective bargaining practices. . . . Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

*NLRB v. American Nat, Ins. Co.*, 343 U.S. 395, 408-409 (1952).

1. The Record Fails To Establish Surface Bargaining By Respondent.

As discussed above, the specific bad faith bargaining allegations set forth in the Second Consolidated Complaint, as amended, are without merit. Thus, they do not support a finding of surface bargaining. The General Counsel, however, also relies upon four prior Board decisions in

which the Board found that Respondent violated the Act. These violations, however, were isolated in nature, and all occurred prior to 2019. They are not indicative of surface bargaining.

The only other conduct specifically identified in paragraph 10 of the Second Consolidated Complaint, as amended, are the allegations that Respondent "insisted upon proposals that are predictably unacceptable to the Union" and "conditioned negotiations on non-mandatory subjects of bargaining." The latter allegation clearly relates to the subject of Union Security/Union Business. It is not entirely clear, however, what proposals, other than Union Security/Union Business, the General Counsel contends were "predictably unacceptable" to the Union. If this is a reference to Respondent's proposals regarding Holidays and Vacations, where Respondent proposed that employees be covered by the Nexstar policies, there was only minimal discussion of these proposals during bargaining. At no time, however, did Respondent insist upon its proposal. Thus, the record is insufficient to make any findings related to Respondent's proposals on these subjects.

Similarly, the General Counsel sought to elicit testimony regarding an "Indemnification" proposal (C-47) made by Respondent:

> The Union agrees to hold harmless and indemnify the Company and any of its agents from any and all liability arising from claims presented by any person or person(s) against the Company alleging breach of data security, invasion of privacy, or any related claims, in connection with the alleged improper disclosure of any and all sensitive personal information of the Company's employees, including, but not limited to social security numbers, it has provided to the union at its request.
>
> The Union agrees to hold harmless and indemnify the Company and any of its agents from any and all liability arising from claims presented by any person or person(a) against the Company alleging that they were injured or harmed in any way by employees of the Company operating motor vehicles while on company business whose driving records were not obtained as a result of the acts of any NABET-CWA agent(s), in whole or part.

(JX 10).

This proposal, however, was advanced at a time when the Union was insisting that Respondent furnish employee social security numbers to the Union as part of the dues checkoff provision. The Company, however, "felt strongly" that social security numbers should not be used for record-keeping purposes. (Tr. 85-86, 613-614). [11] The Union subsequently agreed to substitute an I.D. number for social security number, thereby eliminating this issue. This specific Indemnification proposal was last advanced by Respondent on January 24, 2019. And by October 7, 2019, the parties had agreed to specific indemnification language in Article 3 (Union Business). (JX 6(l), 6(m)).

Regarding Union Security/Union Business, no one disputes that the *amount* of a union's initiation fees, by itself, is a non-mandatory subject of bargaining. On the other hand, whether, and to what extent, an employer will collect a union's initiation fees, is most definitely a mandatory subject of bargaining. *Valley Hospital Medical Center,* 368 NLRB No. 139 (2019). There is no question that Respondent viewed the Union's initiation fees as "excessive." It repeatedly made this assertion and not without foundation. Three weeks of pay is a substantial impediment to hiring new employees, and Respondent was experiencing high turnover rates. Thus, it created a "huge business problem." (Tr. 642-643). But Respondent never insisted to impasse that the Union reduce its initiation fees or "conditioned" negotiations upon such a reduction. Indeed, to the contrary, it eventually modified its proposal to simply eliminate the Company's obligation to collect these fees. Respondent's position was clear and simple. The Union could charge whatever it wanted to charge. It could increase its fee to $10,000. But the Union would have to assume responsibility for collecting these fees. Respondent would collect monthly dues on behalf of the Union, but would play no role

[11] Absent special circumstances, an employer has no obligation to furnish employee social security numbers to a union. This information is not presumptively relevant and raises obvious personal privacy issues. *Sea-Jet Trucking Corp.,* 304 NLRB 67 (1991).

in collecting what Respondent viewed as excessive initiation fees. (Tr. 264-265, 371-372, 626-627). That is a perfectly lawful position, and undoubtedly is why the General Counsel chose to withdraw paragraphs 9 and 11 of the Second Consolidated Complaint.

Respondent's proposal represented a simple solution to this "elephant in the room." The problem, however, was that Biggs-Adams continued to insist that this was a non-mandatory subject and one that she adamantly refused to consider or discuss. In this, she was patently wrong. Nevertheless, it was her obstinacy in this regard that precluded the parties from reaching any resolution of this issue. And in large part, it was the cause of the parties' ultimate failure to reach an overall agreement.

It bears noting that "a mandatory subject and non-mandatory subject can become so intertwined that there is an obligation to bargain over the ostensibly nonmandatory subject." *Utility Vault Co.,* 345 NLRB 79, 83 (2005). The Board's cases establish "that a bargaining subject otherwise considered nonmandatory constitutes a mandatory subject if it has a 'sufficient nexus' to mandatory subjects under negotiation. To establish the requisite nexus, the subjects must be 'intertwined' and 'inseparable.'" *Smurfit-Stone Container Enterprises,* 357 NLRB 1732, 1734 (2011). Here, because Respondent did not insist to impasse that the Union reduce its initiation fee and effectively removed the amount of the fee as an issue by limiting its dues checkoff proposal to monthly dues, there is no need (in evaluating Respondent's bargaining conduct) to decide whether the Union's own bargaining position, which appeared to be that the amount of the initiation fee was inseparable from the entire issue of Union Security and Dues Checkoff and that the Union would not discuss any of these issues, effectively converted the amount of the initiation fee into a mandatory subject of bargaining. However, as discussed below (in evaluating the Union's bargaining conduct), the record strongly indicates that Biggs-Adams did, in fact, come to view the issues as intertwined and inseparable.

Brief mention regarding the subject of wages is also warranted. Paragraph 9 of the Second Consolidated Complaint also alleged that Respondent refused to discuss wages. As noted, that allegation was withdrawn by the General Counsel. It is not specifically mentioned in paragraph 10. Thus, it does not appear to be in issue in this proceeding. However, assuming, *arguendo,* that the subject of wages is pertinent to the surface bargaining allegation, there is nothing in the record that would establish any bad faith on the part of Respondent. The Union came out of the gate with a wage proposal that Respondent quite reasonably viewed as wholly out of the ball park. (Tr. 158-161). Respondent told the Union that its proposal was unproductive, and it made a strategic decision not to put a specific wage proposal on the table until such time as the issue was ripe. (Tr. 405-406, 644-646). [12] Nevertheless, it sent clear messages to the Union by alluding to what it had agreed to in other locations. The fact, however, is that the final two sessions were spent primarily discussing the health insurance issue, and the wage issue was alluded to, but left for a future date. Respondent did not refuse to bargain over wages.

Respondent requests that the surface bargaining allegation be dismissed. As discussed below, however, assuming, *arguendo,* that Respondent's conduct, viewed in isolation, is deemed to rise to the level of surface bargaining, the Union's own bad faith precludes a testing of Respondent's good faith.

2. The Union Engaged In Overall Bad Faith Bargaining.

We start with the Union's repeated refusals to furnish relevant information requested by Respondent. On July 2, 2018, KOIN filed charge number 19-CB-223109 against NABET alleging

[12] Respondent could have put a ridiculously low wage proposal on the table, but to do so would have led to Biggs-Adams attempting to portray Respondent as cheap and miserly. Indeed, this is what she did in her peoplesworld.org article, where she falsely accused Respondent of having proposed a wage increase of 0.1%.

an unlawful refusal to furnish relevant information. The Regional Director issued a merit dismissal on the refusal to furnish information. (JX 66). On December 14, 2018, Respondent requested specific information related to a peoplesworld.org article in which Biggs-Adams was quoted at length. As set forth in the ALJ's Decision, adopted by the Board, Biggs-Adams categorically refused to furnish this information, claiming that it was an "improper" request. The Board, however, concluded that paragraphs 2, 3, 5, 6, 7, and 9 were presumptively relevant and that the Union unlawfully refused to furnish this information. (JX 63, pp. 76-93).

On July 1, 2019, KOIN filed charge number 19-CB-244300 against NABET, alleging an unlawful refusal to furnish information. A Complaint issued on June 5, 2020. This Complaint alleged that NABET unlawfully refused to furnish the following relevant information requested by Respondent on June 26, 2019:

i. All dues and initiation fees authorization forms signed at any time by individuals employed at KOIN-TV from January 1, 2017 to present.

ii. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present outlining or describing their rights under the Beck decision to not pay for the union's political lobbying efforts.

iii. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present outlining or describing their rights to revoke their dues and initiation fees authorization forms.

iv. All notices given or provided to individuals employed at KOIN-TV from January 1, 2017 to present notifying said individuals that the collective bargaining agreement between KOIN-TV and NABET-CWA has expired.

v. All documents establishing the amount of monthly dues charged to employees at KOIN-TV in the collective bargaining unit represented by NABET-CWA, including but not limited to the By-Laws provision establishing same and referendum establishing same.

(JX 63, p. 14).

On October 28, 2020, the Regional Director entered into a unilateral settlement agreement with NABET. KOIN's appeal to the General Counsel was subsequently denied. The information was never furnished to Respondent. (JX 66). It was clearly relevant to the negotiations over Union Security and Union Business, and the Union's refusal to furnish it constituted bad faith bargaining.

On September 27, 2019, KOIN filed charge number 19-CB-248966 against NABET, alleging an unlawful refusal to furnish information related to health and welfare benefits. The Regional Director dismissed the charge, but KOIN's appeal was sustained. On October 28, 2020, the Regional Director entered into a unilateral settlement agreement with NABET. KOIN's appeal to the General Counsel was subsequently denied. The information was never furnished to Respondent. (JX 66). This information related to benefit plans offered directly by the Union to its members and was clearly relevant to the negotiations. That the benefits could not be offered to nonmembers was not a valid objection. As Biggs-Adams acknowledged, Respondent suggested that the parties might offer the Union plan to members and the Nexstar plan to nonmembers. (Tr. 393-394). What is significant is that the parties were exploring options and Respondent was entitled to evaluate the Union plan as an option. The Union's adamant refusal to furnish this information constituted bad faith bargaining.

In addition to its repeated refusals to furnish relevant information, the Union's bargaining position regarding Union Security and Union Business constituted bad faith bargaining in several respects. First, as discussed above, Respondent had removed the amount of the Union's initiation fee from the scope of negotiations by stating that the Union could charge whatever it wanted as an initiation fee ($10,000 if it chose). Respondent's position became and remained that it simply would not be involved in collecting the fee. Biggs-Adams, however, could never in her own mind separate the amount of the initiation fee from the Respondent's role in collecting it. It appears that

in her mind, the issues were one and the same. (Tr. 155-158). Thus, Biggs-Adams continued to assert that it was none of the Company's business. By making the issues inseparable, Biggs-Adams made the entire issue of the initiation fee and how it would be collected a mandatory subject of bargaining.

The same is true with regard to the language of the dues checkoff authorization form, which was expressly set forth in the collective bargaining agreement. Biggs-Adams took the position that the language of this form and whether it would include certain information regarding Beck rights was strictly an internal Union matter that the Union would not discuss. This may have been a valid position had the form not been made part of the collective bargaining agreement, but the parties historically had incorporated the form into the contract, and the Union never proposed to remove it from the agreement. (Tr. 617-618). It matters not whether the language proposed by Respondent was legally required to comply with Beck or whether the Union fully complied with its Beck obligations. The language of the form, which was part and parcel of the entire Union Business article, was a mandatory subject of bargaining and Respondent was well within its rights to propose that Beck language be included in the authorization form.

The sole issues regarding Union Business that Biggs-Adams was willing to bargain about were whether the Company would be required to provide employee social security numbers and whether the Union would pay any administrative fee for Respondent to collect dues. (Tr. 375-376). Beyond that, Biggs-Adams took an adamant position that never changed: It's none of your business. This constituted a refusal to bargain over a mandatory subject of bargaining.

Apart from the Union's unwillingness to discuss major aspects of Union Business, there remains the issue of whether the Union's initiation fee of three weeks of pay, roughly $3,000, was excessive and/or discriminatory within the meaning of § 8(b)(5) of the Act. On March 9, 2020,

KOIN filed charge number 19-CB-257732 against NABET, alleging that the Union violated § 8(b)(3) and (5) by insisting upon an initiation fee that was excessive and/or discriminatory and by coupling it with a union security clause. The Regional Director dismissed the charge on September 25, 2020, and KOIN's appeal was subsequently denied. (JX 66). Nevertheless, Respondent contends that the record demonstrates that the Union's fee is excessive. [13]

Section 8(b)(5) of the Act makes it an unfair labor practice for a labor organization:

> ... to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all of the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected.

"[I]t is well settled that the terms 'excessive' and 'discriminatory' in Section 8(b)(5) are used in the disjunctive and a finding of either is violative of the Act. Further, a determination as to what constitutes an excessive fee is to be made on a case-by-case basis." *Moving Picture Projectionists Local 150 (Garfield Theater),* 274 NLRB 30, 32 (1985). The Board has held that a "discriminatory" fee "must in the nature of things be excessive." *General Longshore Workers, Local 1419 (New Orleans Steamship Association),* 186 NLRB 674, 678 (1970). However, a fee may be "excessive" without being "discriminatory." *Garfield Theater,* 274 NLRB at 33. Thus, "t]he legislative history indicates that the purpose of Section 8(b)(5) is to prevent unions, by the device of exorbitant initiation fees, from circumventing the prohibition against closed shops contained in Sections 8(a)(3) and 8(b)(2)." *Id.* at 32. The relevant wage rate for comparison

[13] The Union's offer to waive the initiation fee solely for employees who joined the Union in October 2019 was obviously discriminatory, as it excluded employees who had previously been required to pay the fee. However, because the offer was in effect only while there was no union security agreement in place, this offer did not, by itself, violate § 8(b)(5). *Ferro Stamping & Mfg. Co.,* 93 NLRB 1459 (1951).

purposes is the starting rate of pay. "However, the Board has never determined a standard ratio." *Id.* at 33. In *General Teamsters Local 326 (Firestone Plastics),* 253 NLRB 551 (1980), the ALJ, approved by the Board, explained:

> Ascribing, as I believe Congress intended, different meanings to the terms "excessive" and "discriminatory," thereby broadening rather than narrowing the reach of Section 8(b)(5), I am of the opinion that unlike a "discriminatory" initiation fee, which embraces elements of motive and of disparate treatment, an "excessive" initiation fee has a more absolute meaning which does not depend upon its motive, its purpose, or its object. Thus, the reasons for the adoption of an initiation fee while relevant to the consideration of whether such fee is discriminatory are not relevant to whether such fee is excessive. The object of, or the purpose to be achieved by, an initiation fee is necessarily outside the scope of the term "excessive." To use concepts such as purpose or object to define excessive would involve the Board in the regulation of the normal activities of trade unions because then the Board would be required to consider the needs of unions for funds and how unions properly could raise funds.

*Id.* at 555.

Here, regardless of the Union's motivation and purpose in establishing an initiation fee in the amount of three weeks of pay, which amounts to approximately $3,000, it is clear that the fee is exorbitant and "excessive" within the meaning of section 8(b)(5). The amount itself, while not determinative, is clearly substantial. Linked as it is to the new employee's weekly wages, it creates an immediate hole that the employee must work three weeks (120 hours) to escape. Put another way, it constitutes 5.8% of the employee's annual income. Thus, it effectively represents a 5.8% pay cut in the first year. The impact of this fee is exacerbated by the fact that it is immediately due and payable within thirty calendar days after date of hire. In its Welcome Letter, the Union explicitly acknowledged that "[m]any people just starting out in the industry encounter difficulties in paying the full initiation fee in one lump sum payment." (RX 3). Thus, the Union offered employees a 25% discount if they immediately paid the fee in full. Alternatively, employees could enter into a payment plan whereby 8% of their gross pay would be deducted from each paycheck.

That the Union felt it necessary to offer such alternatives demonstrates the inherent excessiveness of the fee.

Also relevant is the fact that this initiation fee far exceeds any fee charged within the relevant industry. The relevant industry is not, as the General Counsel and Union may argue, the "entertainment" industry. It is "local television stations affiliated with major broadcast networks." In *Garfield Theater,* the Board rejected the union's contention that the employer, a local movie theater in Alhambra, California, was in the "motion picture" industry. Instead, it found that "the relevant industry for comparison is the projection of motion pictures within commercial theaters." 274 NLRB at 32. A similar analysis is required here. Respondent's survey of initiation fees charged by other local unions with whom it had contracts indicated that the highest fee charged by any of these locals was $525, which was a NABET local in Buffalo, New York. This included a large San Francisco IBEW local, which charged $300. (Tr. 625, JX 38). [14] Neither the General Counsel nor the Union offered any evidence regarding the initiation fees charged by local television stations in any geographic market.[15] On June 27, 2019, Pautsch told the Union that the Company had reviewed many locals, and the highest initiation fee was $500. Biggs-Adams did not dispute this fact, but took the position that it was not an issue. (JX 15, p. 9).

While there is no established ratio between starting wages and a union's initiation fees that is per se excessive, Respondent is unaware of any Board decision that has upheld a fee that was equal to (or greater) than three weeks of pay. For example, in *New York Local 11, NABET (ABC),*

[14] The transcript states "IDW." This is a clear error. Pautsch referenced the IBEW.

[15] Respondent subpoenaed documents from the Union that would have shed light on the initiation fees charged by other union locals. (RX 1, ¶¶ 8, 9, 15, and 16. The ALJ, however, quashed these requests. (Tr. 118-124). Respondent contends that this was error and prevented Respondent from presenting additional evidence regarding typical Union initiation fees in the industry.

164 NLRB 242 (1967), the Board found to be excessive initiation fees that for some employees equaled three or four weeks of pay. [16] In *Motion Picture Screen Cartoonists, Local 839 (American Film Producers),* 121 NLRB 1196 (1958), the Board found excessive a fee that equaled five weeks of pay.[17] In *Motion Picture Screen Cartoonists, Local 841 (NBC),* 225 NLRB 994, 997 (1976), the Board found excessive an initiation fee equal to 4 weeks of pay.

The excessive nature of the fee is further demonstrated by the adverse impact it had on Respondent's ability to hire and retain new employees. Pat Nevin testified that KOIN had an extremely high turnover rate, with 15% of the work force turning over each year. The record reflects that 17 employees departed in 2018, and 17 departed in 2019. (RX 5). Hiring and retaining new employees was hindered by the Union's initiation fees. Employees would hear the amount of the fee and no longer be interested in working at KOIN. (Tr. 790-791). A total of 28 employees were hired in 2018 or 2019, but 11 of these employees departed prior to January 2020. (RX 4, RX 5). Thus, 34 employees departed in 2018 and 2019, but only 17 new hires in 2018 and 2019 remained employed as of January 2020. This is a net loss of 17 employees in those two years.

Respondent contends that the Union's initiation fee was clearly "excessive" and in violation of § 8(b)(5). Although Respondent proposed a solution; i.e. the Union could charge whatever fee it liked, but Respondent would not collect it, Biggs-Adams could never separate the two issues in her mind and in her view, none of it was any of the Company's business. Inasmuch as the fee itself was unlawful, the Union's bargaining position was unlawful, and precluded any testing of Respondent's good faith.

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[16] For employees earning from $119 to $167.99, the fee was $500. For employees earning $168 to $211.99, the fee was $750. For employees earning $212 and over, the fee was $1,000.

[17] The starting wage was $50. The fee was increased to $250.

G. Respondent Did Not Make Unlawful Unilateral Changes Prior To Withdrawing Recognition.

Paragraph 13 of the Second Consolidated Complaint alleges that "In or around late-November and early-December 2019, on dates better known to Respondent, Respondent assigned the bargaining unit work of shooting video at Portland Trailblazers games to a non-bargaining unit individual" and "On or about January 7, 2020, on a date better known to Respondent, Respondent changed its vacation policy."

The allegation regarding a manager performing the bargaining unit work of shooting video at a Portland Trailblazers game fails because the parties' contract expressly permitted managers and supervisors to perform bargaining unit work, provided only that they not permanently replace unit employees. (JX 1, p. 13). That the contract had expired in September 2017 does not alter the fact that this provision was part of the status quo. Neither party sought to modify this provision during negotiations. That one employee had not previously observed a manager shooting video is patently insufficient to establish that the contractual status quo had been altered. Respondent requests that this allegation be dismissed.

The allegation that Respondent unilaterally altered the vacation policy fails for two reasons. First, the change never actually occurred inasmuch as the 2020 Portland Blues Festival was cancelled. Second, insofar as any actual change occurred, it postdates Respondent's withdrawal of recognition. Accordingly, Respondent had no bargaining obligation and was free to make changes without consulting the Union.

H. Respondent Did Not Unlawfully Withdraw Recognition From The Union.

Paragraph 14 of the Second Consolidated Complaint, as amended, alleges that on or about January 8, 2020, Respondent unlawfully withdrew recognition from the Union. Paragraph 15

alleges that thereafter, Respondent made various unlawful changes in employees' terms and conditions of employment.

"Under longstanding precedent, once a union has been designated or selected as the Section 9(a) representative of a bargaining unit, it enjoys a presumption of continuing majority status, which under certain conditions is irrebuttable." *Johnson Controls,* 368 NLRB No. 20 (2019). "At the end of the certification year or upon expiration of the collective-bargaining agreement, the policy-based presumption of majority status becomes factually rebuttable." In *Levitz Furniture Company of the Pacific,* 333 NLRB 717 (2001), the Board overruled its prior "good-faith doubt" standard for withdrawing recognition. Instead, "an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Id.* at 725. While a petition signed by a majority of unit employees stating that they no longer wish to be represented by the union is the most common means of establishing actual loss of majority status, it is not the exclusive means of doing so. Indeed, in *Levitz,* the Board opined: "We emphasize that an employer with objective evidence that the union has lost majority support—*for example, a petition signed by a majority of the employees in the bargaining unit*—withdraws recognition at its peril." (Emphasis added). *Id.* Importantly, "*Levitz* does not require that the evidence proving loss of majority be 'unambiguous.' An employer must prove loss of majority by a preponderance of the evidence." *Wurtland Nursing & Rehabilitation Center,* 351 NLRB 817, 818 (2007).

In this hearing, the General Counsel objected to all of Respondent's evidence on the grounds that it consisted of oral statements made by employees to managers and thus was hearsay. The Judge initially sustained the objection, but then permitted the introduction of the evidence

subject to a later determination of relevance and admissibility. As to the admissibility of the evidence, the Board does not strictly follow the Federal Rules of Evidence. And hearsay often is allowed into the record. Indeed, a petition signed by employees is itself quintessential hearsay. It is an out-of-court statement offered to prove the truth of the matter asserted. The fact that it is a written, rather than oral, statement does not alter its hearsay nature. Yet written petitions are routinely accepted as probative evidence of employees' desires. The question in all withdrawal of recognition cases is not whether the employer's evidence is written or oral in nature. It is the objective nature of the evidence and the quality of the evidence. Subjective evidence, i.e., calling employees as witnesses to testify regarding whether or not they want the union to represent them is not "hearsay," but it is neither admissible nor probative because it is subjective in nature and not capable of verification. Further, it suffers from the fact that the testimony inevitably comes months or even years after the actual withdrawal of recognition. Statements, whether oral or written, by employees that the employer actually relied upon, however, are both relevant and probative.

Prior to *Levitz,* the Board cited oral statements by employees as evidence of the employer's good faith doubt. For example, in *Green Oak Manor,* 215 NLRB 658 (1974), the Board found that the employer lawfully withdrew recognition based on oral statements by employees to management:

> Although only one of the employee witnesses who testified said she specifically advised director Dzialo that she did not want the Union to represent her. I, nevertheless, was persuaded by the testimony of Director Dzialo and the other employee witnesses that the other employees' expressions about the Union meant they were dissatisfied with the Union's activities and representation and no longer desired it as their official representative. Based upon the evidence, I am further of the opinion that the Respondent also understood the employees to mean that they were renouncing their support for the Union.

*Id.* at 663.

Indeed, in *Allentown Mack Sales & Service, Inc. v. NLRB,* 522 U.S. 359 (1998), the Supreme Court held that oral statements by employees to managers were sufficient to lawfully permit the employer to withdraw recognition. Of course, as noted, *Levitz* overruled the good faith doubt standard. But *Levitz* said nothing about, and it placed no limitations on, the type or quality of the evidence that would demonstrate an actual loss of majority support. All that *Levitz* requires is that the evidence be "objective" and that "the more reasonable interpretation" of the evidence be that employees no longer support the Union. *Wurtland Nursing,* 351 NLRB at 818.

The Board's decision in *Anderson Lumber Co.,* 360 NLRB 538 (2014) is instructive. In that case, applying the Board's decisions in *Levitz* and *Wurtland,* Judge Cracraft, affirmed by the Board, considered the impact of out-of-court statements by 8 of the 15 unit employees. She found that 4 of the statements, which were to the effect that the employees wished to resign from the Union or no longer be a union member, were unambiguous, but insufficient to establish that the employees no longer desired representation. She found the statements of the other 4 employees to the effect that the employee no longer wished to be a part of the Union to be ambiguous. Nevertheless, she concluded that "the more reasonable interpretation of these statements is that these four employees no longer desired to be represented by the Union."

It is true that the employee statements in *Anderson Lumber* were all individual written statements. But in analyzing these statements, Judge Cracraft specifically relied upon the Board's pre-*Levitz* decision in *Green Oak Manor.* Thus, she observed that in that case "the employer relied on oral statements from a majority of unit employees that they did not want the union or did not want any part of the union. The Board adopted the administrative law judge's conclusion, id. at 663-664, that these statements meant that employees were dissatisfied with union representation and no longer desired the union to represent them." 360 NLRB at 543. Clearly, contemporaneous

oral statements are as relevant, admissible, and probative as contemporaneous written statements. Indeed, one might convincingly argue that volunteered oral statements by individual employees are far more persuasive than a petition to which employees merely affix their signature.

In summary, in order to support a withdrawal of recognition, an employer must produce objective evidence. The evidence may be in oral or written form, but it must have been in the employer's possession at the time it withdrew recognition. The evidence need not be unambiguous, but the "more reasonable understanding" of this evidence must be that a majority of unit employees no longer desired union representation.

Although the Board's decision in *Johnson Controls, supra,* addressed the specific recurring situation in which an employer anticipatorily withdraws recognition prior to contract expiration, that decision expresses certain principles and policies that are equally applicable when an employer withdraws recognition following contract expiration. In particular, the Board expressed a preference that in cases where the Union's continuing majority status is legitimately questioned by the employer, but the Union asserts otherwise, that dispute be resolved through the Board's representation proceedings rather than through lengthy unfair labor practice litigation:

> The determination of union majority status through unfair labor practice litigation in cases like these has proven to be unsatisfactory. A Board-conducted secret ballot election, in contrast, is the preferred means of resolving questions concerning representation. Under current representation law, both employers and employees can obtain a Board-conducted secret ballot election when, as here, a sufficient number of unit employees have indicated that they no longer wish to be represented by an incumbent union. We conclude that unions, too, should have an electoral mechanism to determine the will of the majority following an anticipatory withdrawal of recognition, and we believe that such a mechanism is preferable to the current *Levitz* regime.

Here, Respondent possessed objective evidence that a majority of unit employees no longer desired Union representation. The Union could have challenged this evidence by filing a

representation petition as set forth in *Johnson Controls*. In that fashion, this dispute could have been definitively resolved in a timely fashion. The Union, however, chose not to pursue this course of action.

Here, the record evidence is sufficient to demonstrate an actual loss of majority support in both units. What the record reflects is not that the employees wanted to be wholly unrepresented; rather, they wanted to change their Union representative. Dissatisfaction with Local 51 led to employees openly and voluntarily voicing their dissatisfaction with the Union to members of management. These statements of dissatisfaction were both objective and unambiguous. All of the employee statements clearly indicated a desire to no longer be represented by Local 51. To the extent these statements were ambiguous, the more reasonable interpretation is that the employees no longer desired Local 51 to serve as their representative.

In the larger unit (unit 1) there were 27 employees. Based on the testimony of Rick Brown, Pat Nevin, and Douglas Key, 17 of these employees had made statements clearly indicating that they wanted the Union out and did not want to be represented by the Union: Thomas Westarp (Tr. 793), James Boehme (Tr. 812-813), Vivian Coday (Tr. 814), Levan Funes (Tr. 814), Chris Thibodeaux (Tr. 815), Andrew Bissett (Tr. 771), Jahaad Harvey (Tr. 816), Douglas Key (Tr. 810) Karl Peterson (Tr. 816), Richard Roberson (Tr. 771), Robert Sherman (Tr. 771), Brian Watkins (Tr. 810), William Cortez (Tr. 767), Christian Montes (Tr. 802), Forest Nguyen, Matthew Rashleigh, and Mike Soe. [18] Thus, the Union lacked majority support in Unit 1, and Respondent lawfully withdrew recognition. The Union could have challenged the Company's decision by filing

[18] Although Key did not recall the names of Nguyen, Rashleigh, and Soe while testifying, Brown's email states that Key told him that all of the photographers except for Hanson and Dingwall were opposed to the Union. (RX 6). But even without these three employees, a majority of Unit 1 had disavowed the Union.

a petition for an election, but it never did so.

In the smaller unit, there were eleven employees as of January 8, 2020. (RX 4). Only four of these employees (Steiger, Johnson, Sparks, and Weir) were on dues-checkoff. All of these employees had been hired prior to September 2017 and thus already had paid their initiation fee. The seven remaining employees (Box, Carey, Cashin, Crooks, Doyle, Juarez, and Kowta) had been hired post-September 2017, were not on dues-checkoff, and presumably had never paid their initiation fee. Thus, there was a major financial reason why these seven employees would prefer to replace Local 51 as their bargaining representative. Despite the Union intimidation efforts, several employees in this unit also specifically advised management that they no longer wanted to be represented by the Union. This included Cambrie Juarez, Kelly Doyle and Derric Crooks. (Tr. 749-755). Further, not a single member of this unit served on the Union bargaining committee and no employee from this unit attended any of the Union-sponsored rallies or events (Tr. 787).

Thus, the Union lacked majority support in Unit 2, and Respondent lawfully withdrew recognition. The Union could have challenged the Company's decision by filing a petition for an election, but it never did so. [19]

Finally, even if Respondent's evidence might otherwise be insufficient, the Union's bad faith bargaining and other unlawful conduct was so egregious as to preclude any testing of Respondent's good faith in withdrawing recognition. This bad faith consisted of multiple refusals to furnish relevant information, refusing to bargain over mandatory subjects such as Union

[19] The General Counsel presented evidence that following Respondent's withdrawal of recognition, the Union sought to canvas employees and to obtain a petition signed by a majority of employees in each unit indicating their continued support for the Union. This post-withdrawal evidence is irrelevant to the lawfulness of Respondent's January 8, 2020 decision to withdraw recognition. Further, as in *Johnson Controls,* the proper course of action would have been for the Union to file representation petitions with the Board.

Security and Dues Checkoff, charging an initiation fee that was so excessive as to violate § 8(b)(5), offering a limited waiver of these initiation fees in October 2019 so as to unlawfully coerce employees to join the Union, informing employees that they were required to join the Union when in fact there was no contract in place, and engaging in unlawful secondary activity against Respondent's advertisers.

There are two issues that have not been discussed in any detail that are particularly significant to the withdrawal of recognition issue: (1) The "Welcome to NABET-CWA" letter that the Union sent out to newly hired employees in 2019, (RX 3), and (2) the September 27, 2019 letter that the Union sent to nonmembers offering to waive initiation fees if they joined the Union in the month of October 2019. (JX 40). In the Welcome Letter,[20] the Union stated:

> **Welcome to NABET-CWA.** According to our records, KOIN-TV ("Company"), with whom we have a collective bargaining agreement, has recently employed you. Article 2 of the Agreement requires that an employee shall within thirty (30) calendar days after the date of hire; make application to pay their financial obligation.

The letter goes on to define the employee's dues and initiation fee obligations. It stated that the initiation fee would be reduced by 25% if paid within thirty (30) days. Otherwise, the employee could pay the fee over time by signing a checkoff form authorizing a deduction of 8% pay per paycheck until fully paid.

Respondent filed an unfair labor practice charge (19-CB-257037), inasmuch as there was no contract in place and thus no obligation to join the Union or pay dues or initiation fees. The

[20] The copy in the record is dated February 27, 2019. The record does not indicate how many similar letters were sent out in 2019. Respondent sought to obtain such information in its subpoena (¶¶ 10, 11) issued to the Union. The subpoena, however, was revoked. Respondent contends that this was legal error. While we do not know how many employees actually received this letter, the record does reflect that 17 employees who remained employed as of January 8, 2020, had been hired after the contract expired in September 2017. (RX 4).

charge was dismissed, but Respondent's appeal to the General Counsel was sustained insofar as it alleged a violation of § 8(b)(1)(A). (JX 63, p. 38). The Union and the General Counsel subsequently entered into a unilateral settlement agreement in which the Union agreed to rescind the pertinent provisions of the letter and issue refunds, upon request. (JX 63, p. 24). The Union's Welcome to NABET letter was clearly coercive and violative of § 8(b)(1)(A).

The second issue concerns the Union's offer to waive the initiation fee for employees who joined the Union and began paying monthly dues in the month of October 2019. Although this offer did not violate § 8(b)(5) because it was made at a time when there was no Union security provision in effect, it nevertheless was coercive within the meaning of § 8(b)(1)(A). Thus, the Union coerced employee support and thwarted employee opposition by offering a limited waiver of a fee that amounted to three weeks of pay. The coercive nature of this offer is apparent: Either join the Union now and start paying monthly dues, or as soon as we get a contract, we are going to force you to cough up roughly $3,000. This is the very type of offer that the Supreme Court condemned in *NLRB v. Savair Mfg. Co.,* 414 U.S. 270 (1973). While the Union's waiver offer in *Savair* occurred prior to an initial representation election, the offer here was no less coercive and misleading. The Union had to have known that opposition to the Union was brewing, and that its support was dwindling. What better way to reverse this trend than by offering an immediate financial carrot valued at saving $3,000 by joining the Union now and countering it with the threat of using the stick (pay $3,000) if an employee wished to exercise his or her legal right to refrain from joining the Union while there was no union security provision in effect.

In combination, as well as alone, the Welcome letter and the Waiver letter unlawfully coerced employees to become Union members. These letters, in conjunction with the Union's extensive bad faith bargaining, created a hostile environment for employees who were seeking to

oust the Union. The Union's bad faith and illegal conduct tainted the Union's right to represent employees and justified Respondent's withdrawal of recognition, particularly in light of substantial evidence that the Union had in fact lost majority support. The Union remains free to file petitions in each unit seeking to establish that they do have majority support.

I. The Alleged Section 8(a)(1) Violations.

Paragraph 16 of the Second Consolidated Complaint, as amended, alleges that Respondent, through Rick Brown, violated Section 8(a)(1) of the Act in the following respects: (a) On January 20, 2020, Brown, in Respondent's newsroom, told employees they should not talk about the Union; (b) On January 23, 2020, Brown, in Respondent's newsroom, told employees they could not hand out Union bulletins because Respondent no longer recognizes the Union; (c) On June 25, 2020, Brown, during a Zoom call with an employee, instructed employees not to discuss wages and wage increases; (d) On June 25, 2020, Brown, during a Zoom call with an employee, made an implied threat to revoke wage increases if employees discussed their wage increases with each other.

Respondent acknowledges that these allegations are supported by the unrebutted testimony of employees Hanson and Dingwall. However, these violations are isolated and may be remedied by the posting of a Board Notice to Employees.

J. No Special Remedies Are Warranted.

Respondent contends that the General Counsel has established no basis for any special remedies. With the exception of a few isolated § 8(a)(1) violations, Respondent did not bargain in bad faith or otherwise violate the Act. And insofar as any violations did occur, they are offset by the Union's own bad faith bargaining conduct. Any violations that did occur can be fully remedied by the Board's standard remedies.

## CONCLUSION

Respondent respectfully requests that the Second Consolidated Complaint, as amended, be dismissed in its entirety.

Dated this 22nd day of January 2021.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that I have this 22nd day of January 2021, served the foregoing BRIEF on the following parties of record by electronic mail:

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